EXHIBIT 4

DOCUMENTS CONCERNING SELECTIVE PROSECUTION

POLICY

#47

SEPTEMBER 2011

Institute *for* Social Policy *and* Understanding

ISPU

RESEARCH MAKING AN IMPACT

NAVIGATING A POST ★ 9/11 WORLD

COUNTERING RELIGION OR TERRORISM:

SELECTIVE ENFORCEMENT OF MATERIAL SUPPORT LAWS AGAINST MUSLIM CHARITIES

Sahar F. Aziz, ISPU Legal Fellow, Assoc. Professor, Texas Wesleyan University School of Law

The American government's preventive counterterrorism strategy is no secret.[1] Weeks after the 9/11 terrorist attacks, then-Attorney General John Ashcroft declared, "Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street. Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage."[2]

As the government adopted a no-tolerance policy, a fear-stricken public watched as images of nefarious dark-skinned, bearded Muslims flashed across millions of television screens. The message was, if there had ever been any doubt, the 9/11 attacks confirmed that Muslims and Arabs are inherently violent and intent upon destroying the American way of life. Heightened scrutiny of these communities was thus perceived not only as warranted, but also as a rational[3] response to an existential threat to the country.

Ten years later, the 9/11 terrorist attacks appear to have succeeded in transforming the American way of life for the worse.[4] In our hasty passage of the expansive PATRIOT Act, our fears gave way to the government's demand for unfettered discretion to preserve national security at the expense of civil liberties for all Americans. As a consequence, the United States has adopted practices commonly found in police states where government surveillance extends into almost every aspect of life.[5]

Body scans at airports strip us of our privacy. Fusion centers have sprung up across the country to gather and deposit intelligence on average Americans in massive government-monitored databases.[6] Warrantless National Security Letters are used to obtain information about our financial and political lives, despite the absence of any evidence of criminal activity.[7] Police departments have shifted resources from fighting crime to mapping communities based on their religion and ethnic origins under the auspices of protecting national security.[8] The overreaching enforcement of broad "material support to terrorism" laws has chilled religiously mandated charitable giving and hampered humanitarian aid operations, thereby eroding the independence of the American nonprofit sector and unduly politicizing humanitarian assistance.[9] And fears of "homegrown terrorism," fueled by irresponsible Congressional rhetoric,[10] have legitimized a bigoted discourse on the country's Muslims to such an extent that some Americans challenge Islam's status as a bona fide religion deserving of constitutional protection.[11]

Ten years later, the 9/11 terrorist attacks appear to have succeeded in transforming the American way of life for the worse.

Electronic copy available at: http://ssrn.com/abstract=2022748

ABOUT THE AUTHOR

SAHAR AZIZ
ISPU Legal Fellow

Sahar Aziz is an associate professor of law at Texas Wesleyan University School of Law. She previously served as a senior policy advisor with the Office for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security and an adjunct professor at the Georgetown University Law Center, where she taught national security and civil rights law. Prior to entering academia, her civil rights law practice focused on post-9/11 discrimination in employment, immigration, and law enforcement. Ms. Aziz serves as senior legal advisor to the Charity and Security Network. The views expressed in this paper are solely her own. Ms. Aziz would like to thank Kay Guinane, David Cole, Mike German, and Shahid Buttar for their invaluable insight and trailblazing advocacy in support of the issues addressed in this paper. She also thanks Danielle Jefferis for her excellent research assistance and insightful legal analysis.

At first glance, the preventive paradigm appears facially legitimate. Few would contest the collective public safety interest in stopping terrorism before it occurs. Even so, at what point should the government be permitted to investigate individuals? Does mere political dissent, even if virulently anti-American, or unpopular orthodox religious practices suffice to subject individuals to heightened scrutiny or a loss of liberty? At what point does legitimate counterterrorism become political and religious persecution? The answers determine the type of country we want to live in: a free and just society consistent with the Founding Fathers' vision, or a paranoid society dislodged from its fundamental principles of fairness and the rule of law.

Aggressive prosecutions of Muslim charities and individuals across the country have embittered communities that feel besieged by their government and distrusted by their non-Muslim compatriots.

While post-9/11 preventive counterterrorism policies have adversely impacted various groups of Americans, no group has been as deeply affected as the Muslim community, especially its Arab and South Asian members.[12] Mosque infiltration has become so rampant that congregants assume they are under surveillance as they fulfill their spiritual and religious obligations.[13] Government informants have ensnared numerous seemingly hapless and unsophisticated young men, thereby sowing distrust among Muslims.[14] Aggressive prosecutions of Muslim charities and individuals across the country have embittered communities that feel besieged by their government and distrusted by their non-Muslim compatriots.[15] As most clearly evinced

Electronic copy available at: http://ssrn.com/abstract=2022748

in the vitriolic discourse surrounding the Park 51 Community Center in lower Manhattan during 2010, selective counterterrorism enforcement has also fueled public bias against Muslims.[16] As a consequence, the vibrancy and development of civil society within these communities is at risk of being significantly stunted.

This article focuses on the use of material support laws in the counterterrorism preventive paradigm and the significant risk they pose to the civil rights and civil liberties of those communities most targeted: Muslim Arabs and South Asians. The wide-reaching and devastating effects of these broadly interpreted material support laws on American Muslim charities and their donors, as well as on the broader American nonprofit sector, has effectively criminalized otherwise legitimate charitable giving, peace-building efforts, and human rights advocacy.

To the extent that these groups are the "miner's canary"[17] in forecasting the post-9/11 loss of civil rights and liberties for all Americans, their experiences demonstrate the United States' downward progression away from the Founding Fathers' vision of a society where individuals can speak, assemble, and practice their faith free of government intervention or persecution.[18]

USING MATERIAL SUPPORT AS A PREVENTIVE COUNTERTERRORISM TOOL

The linchpin of the preventive counterterrorism paradigm consists of those laws that prohibit providing material support to terrorism. These laws are often the fall-back criminal provisions employed when the government cannot prove terrorism charges. But they are so broad and vaguely worded that they effectively criminalize a myriad of activities that would otherwise be constitutionally protected. Moreover, as the government is not statutorily required to prove that the defendant had a specific intent to support terrorism, it has carte blanche to prosecute a broad range of legitimate activities, such as charitable giving, peace building, and human rights advocacy. The Department of Justice, with the Supreme Court's blessing, has consequently criminalized training and advocacy in support of nonviolence on the justification that such activities legitimize a designated group or individual.[19] The government's standards for what it deems as "legitimizing"[20] are so broad that then-Solicitor General Elena Kagan went so far as to call for prosecuting lawyers for filing an amicus brief on behalf of a terrorist organization.[21]

Similarly, humanitarian aid delivered to noncombatant civilians living under the control of a terrorist organization can be illegal based upon the unproven theory that it frees up resources to redirect toward violence. This untenable theory of liability, also known as the "fungibility" doctrine,[22] punitively denies many innocent beneficiaries abroad of food, water, and shelter. But for their misfortune of being trapped in a conflict zone where one party is designated as terrorist, these civilians would have received much-needed aid from American civil society. Furthermore, Muslim American charities providing the humanitarian aid are punished through government-led smear campaigns[23] and prosecutions.

DISPROPORTIONATE ENFORCEMENT AGAINST MUSLIM CHARITIES

With few exceptions, the executive branch has exercised its broad discretion to selectively target Muslim charities engaged in seemingly legitimate humanitarian aid.[24] The result is a serious chilling effect on Muslim communities' willingness to openly partake in political dissent and for Muslim charities to effectively provide international aid using religiously mandated charitable donations to places like Somalia.[25]

Since 9/11, Muslim donors have been scared to make such contributions because they fear prosecution for providing material support to terrorism even though they do not intend to support terrorism. They also fear that their donations will invite government scrutiny and harassment in the form of tax audits, immigration checks, requests for voluntary FBI interviews, inclusion on watch lists, and surveillance.[26] Indeed, donations to Muslim charities fell precipitously in the years immediately following 9/11.[27] As law enforcement increasingly questions Muslims about such donations during voluntary interviews, immigration benefit proceedings, and at the border, this chilling effect is magnified.[28] Ten years after 9/11, many Muslim charities still struggle to return to pre-9/11 donation levels.[29]

The government's closure and designation as terrorist of three of the largest Muslim American charities in the first three months after the 9/11 attacks sent shockwaves through Muslim communities nationwide.[30] In December 2001 during Ramadan, when Muslim charitable giving is at its yearly peak, the government froze the assets of the Holy Land Foundation for Relief and Development, the Global Relief Foundation, and the Benevolence International Foundation.[31] The subsequent criminal prosecution of their officers, board members, employees, and even contracted fundraisers in the United States alarmed Muslim donors, who reasonably feared that even the most tenuous association with a Muslim charity could lead to ruinous consequences.[32] Currently, seven out of the nine charities shut down as a result of terrorism-related investigation or designation are Muslim charities.[33]

SHUTTING DOWN CHARITIES BASED ON MERE ALLEGATIONS

Unbeknownst to many, a formal terrorist designation is not necessary to figuratively tar and feather a charity. A mere investigation by the Department of Treasury is enough to trigger the asset-freezing provision of sanctions laws,[34] thus paralyzing the organization. The law does not require the Treasury Department to have probable cause of a violation of the regulations, nor is it required to seek approval from a judge, either before or after the freeze is imposed. The investigation and resulting freeze have no limits. The ensuing public media coverage then puts the nail in the organization's coffin, as any individual's subsequent association with it is an invitation for government scrutiny, if not prosecution. Before December 2010, such organizations were denied access to their funds to hire a defense lawyer unless the Department of Treasury, the adverse party in any litigation, authorized such expenditures. The department often approved small amounts that were a fraction of the cost of hiring competent counsel.[35]

Despite numerous requests to allow lawyers to represent the accused without a license, new regulations were issued only after the American Civil Liberties Union and Center for Constitutional Rights challenged the existing regulations in connection with the *Al-Aulaqi* suit.[36] Prior to the change, attorneys were permitted to provide uncompensated legal services to designated terrorist organizations without first obtaining a license from OFAC under a very limited set of circumstances.[37] Compensated services were also severely restricted, permitting charities to only fund their legal services through money raised outside the U.S. or, after obtaining a license, money raised by legal defense funds.[38]

The new regulations, issued in December 2010 in response to the *Al-Aulaqi* litigation, finally permitted American lawyers to provide pro bono representation in any proceeding before a court of agency (federal, state, or local), without obtaining a license.[39] The new regulations also permit charities or persons to pay for legal services without obtaining a license if the services involve, among other things, counseling on the requirements of compliance with American law, representation of persons named as defendants in American legal proceedings, and "any other legal services where U.S. law requires access to legal counsel at public expense."[40] However, if the needed legal services are not pro bono and do not fall into the categories of exceptions, the charity or person must still obtain a license.

In addition to the seven shut down Muslim American charities,[41] another six have found themselves at the center of publicly announced terrorism investigations, raids, and surveillance.[42] Unable to overcome the resulting stigma and blacklisting, two of them have permanently closed without ever being designated as terrorist organizations.[43]

GUILT WITHOUT PROOF OF WRONGDOING

Despite the statute's clear meaning, some courts have interpreted material support laws in a way that relieves prosecutors from having to prove that a charity provided donations directly to a designated foreign terrorist organization.

In the *Holy Land Foundation* criminal case, a federal district court in Texas instructed the jury that provision of humanitarian aid to non-governmental groups abroad not designated as terrorist organizations makes American charities and their officers guilty of material support to terrorism if those groups are later shown to be fronts for, or controlled by, a designated terrorist organization.[44] Defendants were convicted based on their donations to local *zakat* committees[45] that provided direct humanitarian aid to impoverished Palestinians in the West Bank and Gaza. The *zakat* committees, which are not designated terrorist organizations, were the indigenous nonprofit organizations with the necessary network to distribute aid. Indeed, the United States Agency for International Development (USAID) and the International Red Cross (IRC) often worked with the same *zakat* committees to deliver aid to Palestinians.[46]

Despite USAID and IRC's similar work in the Palestinian territories, the Holy Land Foundation (HLF) and its Muslim officers were convicted of providing material support to Hamas, a designated terrorist group, on account of donations to the undesignated *zakat* committees. The trial court erroneously instructed the jury that if some individuals in some of the *zakat* committees had some association with Hamas, these donations constituted prohibited material support to Hamas, even if the American charity lacked knowledge of such associations. Although the government could not prove that HLF's donations were transferred to Hamas or that HLF knew or should have known of some of these committees' alleged ties to Hamas, it was found guilty based on its contribution to the undesignated groups. This tenuous, and arguably unconstitutional, theory of liability ultimately exposes all American humanitarian aid agencies operating in conflict zones where designated terrorist groups exist. That USAID can engage in the same activity without sanction further evinces the politicization of humanitarian aid.

The serious legal implications caused twenty of the United States' largest nonprofits and foundations to file an amicus brief in the *Holy Land Foundation* case asking the Fifth Circuit to interpret the material support statute to require proof of knowledge that a recipient of assistance is a designated group or is controlled by one.[47] Amici argued that the district court's jury instructions denied individuals fair notice of what is prohibited and failed to require proof of individual culpability. If the district court's flawed interpretation is upheld on appeal, they argued, it "would jeopardize the legitimate charitable work of countless foundations and charities throughout the United States."[48] Specifically, the material support statute's reach would expand exponentially such that all organizations engaged in humanitarian assistance would be exposed to prosecution.[49] Ultimately, the chilling effect would devastate their important work and deny beneficiaries humanitarian aid.[50]

Notably, the amici included such large and reputable nonprofit organizations as the Carter Center, the Rockefeller Brothers Fund, the Constitution Project, the Council on Foundations, and the Samuel Rubin Foundation.[51] Their participation demonstrates these laws' broader adverse consequences, notwithstanding their selective enforcement against Muslim groups and individuals. Ultimately, the Department of Treasury and the Department of Justice's refusal to transition from their current draconian strategy to a transparent and fair process collectively weakens American civil society.

Although material support laws were initially enforced against Muslim communities, aggressive prosecution has since spread to other groups as the government seeks to convince the public that it is actively protecting national security. The 2010 Supreme Court ruling in *Holder v. Humanitarian Law Project* brought to light the broad-reaching adverse implications of the laws prohibiting material support to terrorism. The plaintiffs, a former federal administrative law judge and American-based advocacy groups, sought to train the Kurdistan Workers' Party in Turkey (PKK), a designated foreign terrorist organization.[52] While the PKK engaged in violent activities, the plaintiffs expressly sought to train members on how to use humanitarian and international law to peacefully resolve disputes and petition for humanitarian relief before the United Nations and other representative bodies.[53]

To the dismay of many peace building and humanitarian aid organizations, the Supreme Court found that the law criminalizing the plaintiffs' activities is constitutional.[54] In a stinging dissent, Justice Breyer criticized the majority's failure to differentiate between aiding terrorist groups that engage in violent terrorist acts and those that participate in legitimate democracy-building advocacy that, in effect, decreases terrorism.[55] The ruling criminalized the plaintiffs' efforts to stop the groups' violent activities and promote peaceful advocacy, thereby making it illegal for Americans to teach groups to put down their guns, pick up their pens, invoke international human rights law, and seek redress through international tribunals.

The criminalization of aid and advocacy directly contradicts our nation's stated commitment to international human rights law and sends a message to the world that the United States is not serious about human rights and peaceful conflict resolution. Moreover, the ruling undermines American civil society, for its independent nonprofit sector plays a pivotal role in international peace-building efforts and the provision of humanitarian aid to impoverished civilians trapped in conflict zones.[56] However, the Court's interpretation of the material support laws now limits international peace-building efforts to highly politicized, and often ineffective, government programs sponsored by the U.S. Department of State or USAID.

Ultimately, this current formulation and interpretation of material support laws undermines our nation's reputation in the international community, our national security interests in minimizing violence and terrorism abroad, and our own civil society.[57]

COLLATERAL PROSECUTION AND THE SURVEILLANCE OF MUSLIM DONORS

While few individual donors have been prosecuted for material support arising out of the charities' prosecutions,[58] many have experienced collateral prosecution[59] on account of their donations to charities under investigation or being prosecuted.[60] The resulting fear of collateral adverse consequences is striking and significantly undermines donors' confidence in the government's interest in protecting their fundamental right to religious freedom.[61] Muslim donors worry that once the government becomes aware of their donations to Muslim charities, especially to those engaged in humanitarian relief efforts abroad, they will become targets of investigation and prosecution. They fear that the government uses the donor lists of charities, either designated or under investigation, as a starting point for investigating terrorism, even if they have no individualized evidence of wrongdoing.[62] Hence these lists are suspected of serving as the starting point for fishing expeditions in search of terrorists.

Unlikely a coincidence, major donors have experienced burdensome tax audits, denials of citizenship applications, deportation proceedings, and surveillance.[63] Major donors have also been targeted for interviews regarding their donations and knowledge of Muslim charities' activities locally and nationally.[64]

Complaints about such targeting have been documented by the American Civil Liberties Union (ACLU), the Asian Law Caucus, Muslim Advocates, the Arab American Anti-Discrimination Committee, and other advocacy groups representing these communities.[65] Some of these interviews are involuntary, as they occur at the border when individuals attempt to return from abroad.[66] Others are a result of ubiquitous FBI requests for voluntary interviews, which many community members accept without legal representation as an earnest, but ill-advised, gesture to prove their innocence. The ACLU, for instance, has documented reports of law enforcement targeting Muslim donors in Texas, Michigan, New York, Virginia, Florida, Louisiana, California, Minnesota, Missouri, and Wisconsin through "voluntary" interviews.[67] Many of the interviews resulted in criminal charges for material false statements unrelated to terrorist activities.[68] Such non-terrorist-related charges have confirmed the community's concerns about selective prosecution due to one's religious and/or political beliefs.

These fears of increased government scrutiny and surveillance are fueled by a prevalent perception that the Federal Bureau of Investigations (FBI) and local police agents are omnipresent in mosques in cities with large Muslim populations.[69] Muslim congregants have complained to advocacy groups of FBI informants infiltrating their mosques to monitor speech, sermons, and charitable giving within the mosque.[70] For instance, the FBI continued to monitor a mosque in Albany for years after 9/11, despite arresting and deporting the original target of the investigation.[71] Agents even went so far as to install cameras aimed at the mosque's front and rear entrances with questions of whether the mosque was also bugged going unanswered.[72] Moreover, congregants report being pressured to serve as informants in exchange for relief from heightened governmental scrutiny.[73] Numerous news reports on coercive recruitment tactics and pervasive mosque surveillance reinforce Muslims' perceptions that the FBI monitors donations given in the mosque.[74] The adverse effect of this discriminatory targeting of American Muslim charities providing humanitarian aid to Muslim regions abroad does more than just chill religious freedom;[75] it undermines the country's credibility in its publicized outreach initiative to Muslims and ultimately impedes its foreign policy prerogatives in the Middle East. Moreover, Muslims abroad view such treatment as a litmus test of American sincerity vis-à-vis its various international initiatives, such as democratization projects, the defense of human rights, and the strengthening of civil society. When they see discrimination against Muslims in the United States, they reasonably question the legitimacy of its proclaimed leadership in supporting liberal democratic ideals. Such double-talk, therefore, renders this country irrelevant at best, or obstructionist at worst, in international forums addressing anti-discrimination, human rights, and the rule of law.

FEASIBLE SOLUTIONS REJECTED BY THE GOVERNMENT

In response to this draconian process, the Charity & Security Network, a broad coalition of highly regarded nonprofit organizations, has urged the Department of Treasury to implement due process protections during the designation and investigation process.[76]

Current law prevents a designated nonprofit organization from meaningfully defending itself.[77] The organization is designated and its assets frozen without notice or opportunity to defend itself before the fact. The absence of a mechanism comparable to the Classified Information Procedures Act used in the criminal context that allows defendants to confront classified evidence prevents the nonprofit organization from reviewing the entire record of evidence used against it for designation. Nor is it permitted to offer evidence in its own defense at the pre-designation or federal appeals phase.[78] Such minimal due process rights undermine the legitimacy of the process. Indeed some question whether designation is more about politics than the law.[79]

Rather than adopt a draconian designation process that assumes guilt without the benefit of the organization's defense, designated groups should be afforded a meaningful opportunity to defend themselves promptly in the wake of an asset freeze. This would require the government to disclose sufficient information regarding its classified case. It should also be obligatory for the government to provide notice of the charges and a statement of the reasons, neither of which is currently required.

Thoughtful solutions by highly skilled attorneys have been proposed on numerous occasions and blithely dismissed by Department of Treasury and White House officials. Officials often cite the ease with which an organization may transfer money abroad to avoid having its assets frozen for illicit acts.[80] While such concerns are reasonable, they too can be addressed without compromising the nonprofit organization's due process rights. An independent conservator could be appointed to oversee the charity's finances pending investigation. This option assures the government that funds will not be transferred abroad out of their jurisdiction and prevents the collective punishment of the entire organization, as well as its donors and beneficiaries, on account of mere allegations. Likewise, its investigations should adopt the same investigative techniques applied to corporations suspected of fraud, where the focus is on individual bad actors rather than the entire corporation. So long as the organization can show that it has acted in good faith and any wrongdoing was a result of a limited number of individuals, it should be spared total liquidation. This more reasonable approach not only protects charitable organizations, but also those of its beneficiaries who are in desperate need of humanitarian assistance.

Additionally, while the new regulations permitting a charity to pay for particular legal services are welcome, there is little justification for the government's continued refusal to allow the undesignated charity access to its funds for those services that are not the focus of the investigation. Especially in the case of large charities, operations expand into various countries, whereas the government's concerns may be limited to only operations in a particular country or related to a specific project. The government has yet to provide a reasonable explanation, other than its punitive preventive philosophy, for shutting down an entire organization rather than stopping the activity being investigated. Moreover, once the government freezes the funds it refuses all requests to release them to other charitable organizations performing the same work in accordance with the *cy pres* principle.[81] Tellingly, the government would rather keep the funds frozen indefinitely with no regard for the needs of intended beneficiaries. Such contradictions evince the politicization of counterterrorism that, thus far, has most adversely impacted Muslim charities and donors.

At stake is far more than the due process rights of a particular organization and the sustainability of the nonprofit sector – both of which are important in their own right. But equally significant is the legitimacy of the U.S. government's counterterrorism strategy. The material support laws and terrorist designation process has become unduly politicized as shown by overreaching, if not outright abusive, enforcement.

It is long overdue for the government to acknowledge failings of the designation regime and give serious thought to the thoughtful recommendations of the nonprofit sector.[82]

CONCLUSION

Ten years after 9/11, the American government's preventative counterterrorism strategy has cost millions of taxpayer dollars, diverted thousands of law enforcement personnel away from preventing non-terrorism-related crimes, and failed to prevent terrorist attacks committed by Muslims and non-Muslims alike. Rather than engage in responsible governance and reassess failed strategies, it continues to employ fear-based narratives to persuade the public to keep pouring billions of dollars into flawed and ineffective national security projects.

Evidence of the failure of counterterrorism strategies is ample. The government has failed to prevent some of the most serious attempted terrorist plots over the past few years. But for a fortuitous technical failure and the rapid response of a Muslim Mauritanian reporting the smoke, thousands of people could have been killed in Times Square. Similarly, the Nigerian Christmas Day bomber would have successfully killed hundreds on an airplane headed for Detroit if his bomb had not failed to ignite. White supremacist James Cummings[83] was actively constructing a lethal dirty bomb at home undetected by the FBI. Only after his wife shot him in self-defense did the government discover his terrorist plot. In other cases, terrorists succeeded in terrorizing the American public without government intervention. Joseph Stack flew an airplane into an IRS building in Austin, Texas, in protest of IRS demands that he pay his taxes.[84] His terrorist attack killed an IRS employee who was a military veteran. Had the attack occurred at a different time of day, hundreds of IRS employees could have been killed. Jared Lee Loughner shot Congresswoman Gabrielle Giffords (D-AZ) and killed six people due to both his mental illness and questionable political objectives.[85]

While countering terrorism is no easy feat, it is remarkable that the government was unable to prevent these attacks after having invested so many resources into counterterrorism, often at the expense of the civil liberties of all Americans. Despite the creation of numerous fusion centers nationwide, the relaxation of surveillance laws,[86] the use of technology to surveil nearly every aspect of life in this country, and the reallocation of thousands of agents to countering terrorism, the government has yet to show results proportionate to the monumental vested resources. In the apt words of David Cole and Jules Lobel, we have become both less safe and less free.[87]

What these strategies accomplish quite well is the stigmatization of more than 6 million Muslims in the United States because of the illegal acts of a handful of Muslims – some of whom are foreign and have no ties whatsoever to this country. Many American Muslims feel that they live a second-class existence because their houses of worship are more likely than others' to be under surveillance and monitored. Their Internet activity is more likely to be under heightened scrutiny for any signs of political dissent. Their religious practices are under the microscope by purported terrorist experts who cannot tell the difference between orthodox Islamic practices and bona fide terrorist activity.[88] And, Muslim women's religious headwear is perceived as an insignia for terrorist inclinations that justify discriminatory treatment.[89]

Predictably, what started out as a focus on vulnerable religious and racial minorities has now spread to a broader segment of Americans. Laws prohibiting material support to terrorism that were initially applied to Muslim individuals and institutions are increasingly being enforced against various individuals and institutions engaged in humanitarian aid, peace building, and human rights advocacy. Non-Muslim activist groups who have been engaged in legitimate advocacy for decades are now being targeted for investigation and potential prosecution pursuant to material support to terrorism laws.[90] A combination of public apathy about the state of civil liberties, pervasive stereotypes of Muslims as terrorists, and government misinformation about the efficacy of counterterrorism policies has facilitated increased surveillance and investigative authorities commonly found in police states.[91]

Perhaps the most troubling factor in recent national security discourse is the increasingly alarmist and overtly biased collective categorization of Muslims as terrorists. Specifically, Representative Peter King's (R-NY) recent Congressional hearings, characterized as a political circus by some, legitimized America's worst fears.[92] That American Muslims are so distrusted as to warrant hearings focused solely on questioning their loyalty is reminiscent of our nation's collective punishment of Japanese Americans during WWII.

The silver lining in the disconcerting homegrown terrorism debates is the broad coalition of groups that rejected King's presumptions of collective guilt on Muslims on account of the bad acts of a few. Christian, Jewish, and civil rights groups representing a diversity of demographics challenged the merits of limiting "homegrown terrorism" to terrorism committed only by Muslims.[93]

Unfortunately, insufficient attention was paid to the importance of allowing Muslims, and all Americans in general, to express political dissent openly despite the unpopularity of their views. Instead, Muslim groups and their allies sought to reassure political leaders and a suspicious public of the Muslim Americans' undying loyalty to the nation and their status as "model minorities."[94] Rather than focusing on the right of Americans, including Muslims, to be radical so long as their activities do not violate the law, the Muslim groups and their allies adopted King's narrative to shape Muslim political beliefs and religious practices in accordance with a definition of a citizen who is passive toward their government. Indeed, the homegrown terrorism hearings were a missed opportunity to shift the focus on the fundamental American principle to hold unpopular or controversial views, rather than to prove the innocence of a suspected religious minority.

It is long past time for the government to reassess the successes and failures of its counterterrorism policies over the past ten years. Are we safer, or have we just been lucky? Has the PATRIOT Act made our government better able to prevent terrorism? Is it time for Americans, as members of Congress have proclaimed, to thoughtfully debate the Act's efficacy and whether its infringements on all Americans' civil liberties are warranted?[95] Are we seeking to rationalize our forfeiture of civil liberties by convincing ourselves that our national security policies work, irrespective of the facts on the ground? If we cannot answer these questions with concrete evidence, then we have little to show for the last ten years of significant government expenditure, public anxiety, and the high civil liberties costs imposed on a significant number of Americans.

In light of our nation's checkered civil rights record and ample opportunity to learn from the past, there is simply no excuse for repeating the same mistakes on yet another different and vulnerable minority group. Preventing a terrorist attack need not come at the expense of vilifying a religious minority. Nor should it require sacrificing this country's most fundamental civil rights and liberties.

ENDNOTES

1 *See, e.g.*, David Cole & Jules Lobel, Less Safe, Less Free 23-33 (2007); Pres. George W. Bush, Commencement Speech at West Point, June 1, 2002, *available at* http://www.nytimes.com/2002/06/01/international/02PTEX-WEB.html ("If we wait for threats to fully materialize, we will have waited too long. ... [T]he war on terror will not be won on the defensive."); Att'y Gen. John Ashcroft, Prepared Remarks at the Council on Foreign Relations, Feb. 10, 2003, *available at* http://www.justice.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm ("In order to fight and to defeat terrorism, the Department of Justice has added a new paradigm to that of prosecution – a paradigm of prevention. ... Our new, international goal of terrorism prevention ... involves anticipation and imagination about emerging scenarios, the puzzle pieces of which have yet to come into alignment.").

2 Att'y Gen. John Ashcroft, Prepared Remarks at the U.S. Mayors Conference, Oct. 25, 2001, *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm.

3 *See* Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 767-774 (1990) (arguing that the mainstream, institutionalized discourse defines racism as irrational because it is the "distortion of reason through the prism of myth and ignorance" and it clouds perception "with beliefs rooted in superstition"; hence, selective targeting based on "reason" or "rational" characteristics cannot be racist).

4 *See, e.g.*, Evan Perez, *Rights Are Curtailed for Terror Suspects*, Wall St. J., Mar. 24, 2011, *available at* http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html?mod=WSJ_hp_LEFTTopStories (highlighting the Obama administration's new policy curtailing *Miranda* rights for terror suspects that will likely erode *Miranda* rights for all criminal defendants, as the FBI has unfettered discretion to choose against whom to invoke the new policy).

5 *See* Associated Press, *With CIA Help, NYPD Built Secret Effort to Monitor Mosques, Daily Life of Muslim Neighborhoods*, WPost (Aug. 24, 2011), available at http://www.washingtonpost.com/national/with-cia-help-nypd-built-secret-effort-to-monitor-mosques-daily-life-of-muslim-neighborhoods/2011/08/24/gIQAr87haJ_story.html (describing the infiltration of undercover agents and paid informants in mosques, coffee shops, and ethnic neighborhoods spying on Muslims in what appear to be fishing expeditions)

6 Fusion centers are state, local, and regional institutions originally created to improve the sharing of anti-terrorism intelligence among different law enforcement agencies. Each individual center emerged and developed independently. For many, the scope of their mission has expanded dramatically, as has the scope of the information they collect and analyze. Participation in the centers has also grown to include not only law enforcement, but other government entities, the military and members of the private sector as well, leading to serious privacy concerns. *See* Michael German & Jay Stanley, *What's Wrong With Fusion Centers?*, Am. Civil Liberties Union (2007), *available at* http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf.

7 *See* 18 U.S.C. §§ 2709(b)(1)-(2) (requiring third-party disclosure where information sought is only "*relevant to an authorized investigation* to protect against international terrorism or clandestine intelligence activities") (emphasis added).

8 Despite the persistent economic slowdown, the Department of Justice's budget request for Fiscal-Year 2011 to "strengthen national security and counter the threat of terrorism" includes over $300 million in program increases. U.S. Dep't of Justice, *FY 2011 Budget Request*, *available at* http://www.justice.gov/jmd/2011factsheets/pdf/national-security-counter-terrorism.pdf. *See also* U.S. Dep't of Justice, *Domestic Investigations and Operations Guide* 21-38, *available at* http://www.muslimadvocates.org/DIOGs_Chapter4.pdf (permitting mapping of communities based on race or ethnicity so long as it does not serve as the sole basis for monitoring specific communities).

9 For extensive information about the adverse impact of material support to terrorism laws on the nonprofit sector, see the Charity and Security Network at www.charityandsecurity.org.

10 *See, e.g.*, Laurie Goodstein, *Police in Los Angeles Step Up Efforts to Gain Muslims' Trust*, N.Y.Times, Mar. 9, 2011, *available at* http://www.nytimes.com/2011/03/10/us/10muslims.html (reporting Rep. Peter King "says that American Muslims do not cooperate"); Scott Shane, *For Lawmaker Examining Terror, a Pro-I.R.A. Past*, Mar. 8, 2011, *available at* http://www.nytimes.com/2011/03/09/us/politics/09king.html (reporting Rep. King asserted that "eight-five percent of leaders of American mosques hold extremist views and that Muslims do not cooperate with law enforcement").

11 *See* Brief for the U.S. as Amicus Curiae, Estes v. Rutherford Cnty Reg'l Planning Comm'n, No. 10cv-1443, at 1 (Tenn. Ch. Ct. Oct. 18, 2010), *available at* http://www.justice.gov/crt/about/hce/documents/murfreesboro_amicus_10-18-10.pdf) ("Plaintiffs have put into controversy whether Islam is a religion and whether a mosque is entitled to treatment as a place of religious assembly for legal purposes.").

12 For a general description of the distinctions between the Arab, Muslim, Middle Eastern, Sikh, and South Asian communities, see Sahar F. Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.City L. Rev. 33, 43-50 (2009).

13 *See, e.g.*, Thomas Watkins, *Suit Claims FBI*

Violates Muslims' Rights at Mosque, ABC News, Feb. 23, 2011, *available at* http://abcnews.go.com/US/wireStory?id=12977749 ("Plaintiffs in a lawsuit against the FBI said Wednesday that the agency's use of a paid informant to infiltrate California mosques has left them and other Muslims with an enduring fear that their phones and e-mail are being screened and their physical whereabouts monitored."); Jerry Markon, *Mosque infiltration feeds Muslims' distrust of FBI*, Wash. Post, Dec. 5, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html (reporting on case of mosque infiltrator's case backfiring); Salvador Hernandez, *Judge: FBI Lied But Documents About Muslims Secret*, Orange Cty. Register, *available at* http://articles.ocregister.com/2011-04-29/news/29491933_1_fbi-s-documents-islamic-shura-council-muslim (finding "the FBI Documents connected to surveillance of several Islamic organizations and Muslim leaders will not be released, but a federal judge strongly rebuked the government for lying about the existence of the documents to the federal court."); *With CIA Help, NYPD Built Secret Effort to Monitor Mosques, Daily Life of Muslim Neighborhoods*, *supra* note 5.

14 *See, e.g.*, William Glaberson, *Newburgh Terrorism Case May Establish a Line for Entrapment*, N.Y.Times, June 15, 2010, *available at* http://www.nytimes.com/2010/06/16/nyregion/16terror.html (reporting that FBI informant allegedly entrapped four young Muslim men with "promises of a $250,000 payment and a BMW" into planning to bomb synagogues and shoot down military planes, despite the four men being "so ill-equipped to plan an attack that none had a driver's license or a car"); Amanda Ripley, *The Fort Dix Conspiracy*, Time, Dec. 6, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1691609,00.html (reporting on allegations that FBI informant "brainwashed" and tricked six young men accused of plotting to attack Fort Dix) ("[I]f the rumors of entrapment become so corrosive that no one in the Muslim-American community feels safe talking to the FBI, then the government has lost its best potential ally.").

15 *See, e.g.*, *Blocking Faith, Freezing Charity*, Am. Civil Liberties Union 118-20 (2009), *available at* http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf (discussing alienation of Muslim Americans as a result of government's actions toward Muslim charities and donors).

16 *See, e.g.*, N.Y.Times, *Imam's Wife Tells of Death Threats*, Oct. 3, 2010, *available at* http://www.nytimes.com/2010/10/04/nyregion/04daisy.html?ref=park51 (reporting death threats made against Park 51 imam and his wife).

17 *See* Lani Guinier & Gerald Torres, The Miner's Canary 11 (2003) ("Race, for us, is like the miner's canary. Miners often carried a canary into the mine alongside them. The canary's more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected, thus alerting the miners to danger. ... Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.").

18 Notably these rights were initially restricted to white men of property and a certain amount of wealth. They did not apply to women, slaves, native Americans, or to other ethnic groups who came later on, some of whom eventually managed to become "white." *See, e.g.*, John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 Yale L.J. 817 (2000); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261 (1997).

19 *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2709 (2010).

20 *See id.* at 2710 ("It is not difficult to conclude ... that the taint of [the terrorist groups'] violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means." *But see id.* at 2736 (Breyer, J. dissent) ("But this 'legitimacy' justification cannot by itself warrant suppression of political speech, advocacy, and association. ... [W]ere the law to accept a 'legitimating'

effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won.").

21 Elena Kagan, Oral Argument, *Humanitarian Law Project*, No. 08-1498, Feb. 23, 2010 ("[B]ut to the extent that a lawyer drafts an amicus brief for [a terrorist organization] ... then that would indeed be prohibited.").

22 *See Humanitarian Law Project*, 130 S. Ct. at 2725-26 ("Money is fungible and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.' ... But, 'there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.' ... Thus, '[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.') (citations omitted).

23 *See Blocking Faith, supra* note 15, at 42 (noting that government's freezing of KindHearts assets put the charity out of operation, despite never instituting criminal proceedings or designating KindHearts a terrorist organization); *see also* Press Release, U.S. Dep't of Treasury, Treasury Freezes Assets of Organization Tied To Hamas, Feb. 19, 2006, *available at* http://www.treasury.gov/press-center/press-releases/Pages/js4058.aspx (announcing KindHearts' assets blocked merely *pending investigation* of providing support to terrorism) (emphasis added); Kindhearts for Charitable Humanitarian Dev't, Inc. v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (finding blocking assets pending investigation violated Fourth Amendment).

24 Seven out of the nine United States charities shut down pending terrorism-related investigation or designation are Muslim charities. *See Blocking Faith, supra* note 15, at 8.

25 *See, e.g.*, Eric Gorski, *U.S. Muslims Experiencing Anxiety Over Roles*, Denver Post, Aug. 19, 2011, *available at* http://www.denverpost.com/frontpage/ci_18692208 (quoting a local imam stating "IRS scrutiny of giving to Islamic charitable organizations had a chilling effect on donations" causing the mosque to shut down).

26 *Id.* at 89; *see also Muslim Charities and the War on Terror*, OMB Watch 5 (2006), *available at* http://www.ombwatch.org/files//npadv/PDF/MuslimCharitiesTopTenUpdated.pdf ("Many in the Muslim community fear that their donations might land them on a list of suspected terrorist sympathizers and supporters, even if they are completely unaware of any wrongdoing or if the charity comes under suspicion years later."); *With CIA Help, NYPID Built Secret Effort to Monitor Mosques, Daily Life of Muslim Neighborhoods, supra* note 5.

27 *See Muslim Charities and the War on Terror, supra* note 26, at 5 ("In this climate of fear and suspicion, donations to Muslim charities have declined significantly since last Ramadan. Some Muslim donors are turning to nondenominational groups and local causes, while others are choosing to give anonymous cash donations – a practice that ends up hindering the government's ability to prevent terrorist financing and demonstrates the extent to which the right to give openly has been compromised.").

28 *See, e.g., id.* at 69-72, 92, 100; *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*, Muslim Advocates (2009), *available at* http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf.

29 *See Blocking Faith, supra* note 15, at 92-93 (reporting donation levels down at least fifty percent at many charities and mosques).

30 *Id.* at 7; *see also* Sahar F. Aziz, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?* 9 Tex. J. C.L. & C.R. 45, 46 (2003).

31 *Blocking Faith, supra* note 15, at 7.

32 *See, e.g.*, Kathryn A. Ruff, *Scared to Donate:*

An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors, 9 N.Y.U. J. Legis. & Pub. Pol'y 447, 473 (2006) ("While some of those fears are grounded in the possibility of actually funding terrorism, a greater reason for the drop in religious donations is that many Muslims are afraid of becoming targets of law enforcement and branded as terrorists due to their connections with a charity that comes under investigation.").

33 The seven Muslim charities are: Al-Haramain Islamic Foundation-USA (Oregon), Benevolence International Foundation (Illinois), Global Relief Foundation (Illinois), Holy Land Foundation for Relief and Development (Texas), Islamic American Relief Agency—USA (Missouri), Goodwill Charitable Organization (Michigan), and KindHearts for Charitable Humanitarian Development (Ohio). *See Blocking Faith, supra* note 15, at 11.

34 Aziz, *supra* note 30, at 54 ("The [International Emergency Economic Powers Act's] asset freezing provision applies to 'any foreign person, foreign organization, or foreign country that [the President] determines has planned, authorized, aided or engaged in such hostilities or attacks against the United States ...,' as well as to suspect domestic organization, regardless of their affiliation with a specific attack." (citing 50 U.S.C. § 1701(a)(1)(C) (West 2003))); *Muslim Charities and the War on Terror, supra* note 26, at 2 (reporting the executive has "largely unchecked power" to seize a groups materials, assets and property *pending an investigation* into terrorism ties).

35 *See, e.g.*, Brief for Plaintiffs, KindHearts for Charitable Humanitarian Dev. v. Geithner, No. cv-2400, at 53-59 (N.D. Ohio Feb. 2, 2009) (arguing that KindHearts has constitutional right to use its funds to pay for its legal defense).

36 *See* Complaint, ACLU v. Geithner, No 1:10-cv-01303 (D.D.C. Aug. 3, 2010) (arguing

37 *See id.* at ¶¶ 21-22 (citing previous versions of 31 C.F.R. §§ 594.101-594.901 and specifically § 594.506(a)). Note that the regulations for designated organizations allow for pro bono legal representation without an OFAC license whereas prior to the Al-Aulaki case, an organization under investigation for designation had obtain an OFAC license in order to retain legal counsel. *See infra* note 39.

38 *See, e.g.* KindHearts for Charitable Humanitarian Dev't, Inc. v. Geithner, 647 F. Supp. 2d 857, 912-919 (N.D. Ohio 2009) (finding OFAC's policy restricting use of blocked assets for compensation of legal services reasonable and facially valid but application of policy to KindHearts' case to be arbitrary and capricious).

39 75 Fed. Reg. 75,904, 75,906 (Dec. 7, 2010) (amending 31 C.F.R. § 594.506); *see also New Treasury Rule Improves Access to Lawyers for Listed Charities*, Charity and Security Network, Dec. 15, 2010, *available at* http://www.charityandsecurity.org/news/Treasury_Improves_Access_Lawyers_Charities; *see also Government Changes Attorney Licensing Regulations in Response to Lawsuit Filed by CCR and ACLU*, American Civil Liberties Union, Dec. 17, 2010, *available at* http://www.aclu.org/national-security/government-changes-attorney-licensing-regulations-response-lawsuit-filed-ccr-and-a.

40 *See* New Treasury Rule, *supra* note 39.

41 *See supra* note 33.

42 The six charities are: KinderUSA (Texas), Life for Relief and Development (Michigan), Al-Mabarrat (Michigan), Child Foundation (Oregon), Help the Needy (New York), and Care International (Massachusetts). *See Blocking Faith, supra* note 15, at 12.

43 Help the Needy and Care International have closed. *Id.*

44 *See, e.g.*, Kathryn A. Ruff, *supra* note 32, at 476 (reporting that despite KinderUSA's attempts to structure its practices to specifically not violate material support laws, it nevertheless stopped soliciting donations due to FBI surveillance, wiretapping, attempts to subvert employees, and the government's spreading of malicious information).

45 *Zakat*, one of the five pillars of Islam, requires that Muslims donate a certain amount of their annual earnings to charity. In many Muslim countries, this charitable giving is managed by locally controlled committees that collect and distribute the donations. *See generally* Liz Leslie, *Ramadan and Charity: What Is Zakat?*, Muslim Voices, July 28, 2010, *available at* http://muslimvoices.org/ramadan-charity-zakat/.

46 *See* Conviction of Holy Land Foundation Raises Questions, Concerns for Nonprofits, Charity and Security Network, Nov. 25, 2008, *available at* http://www.charityandsecurity.org/news/Conviction_Holy_Land_Raises_Questions_Concerns_Nonprofits ("[T]he same zakat committees have received aid from the International Red Cross and the U.S. Agency for International Development.").

47 Brief for Charities, Foundations, Conflict Resolution Groups and Constitutional Rights Organizations as Amici Curiae Supporting Defendant-Appellants, United States v. Holy Land Found., No. 09-10560 (5th Cir. Oct. 26, 2010); *see also* Charity and Security Network, *Brief Argues Material Support Conviction Should Require Knowledge of Terror Connection*, Oct. 26, 2010, *available at* http://www.charityandsecurity.org/news/Brief_Argues_Material_Support_Conviction_Should_Require_Knowledge_of_Terror_Connection.

48 Brief for Charities, Foundations, Conflict Resolution Groups and Constitutional Rights Organizations as Amici Curiae Supporting Defendant-Appellants, United States v. Holy Land Found., No. 09-10560 (5th Cir. Oct. 26, 2010).

49 *Id.*

50 *Id.*

51 *Blocking Faith*, *supra* at note 15, at 7.

52 *Humanitarian Law Project*, 130 S. Ct. at 2708.

53 *Id.* at 2717.

54 *See id.* at 2708, *see also* Press Release, Constitution Project, Holder v. Humanitarian Law Project Upholds Broad Application of Material Support Laws to Prohibit Pure Speech That Furthers Lawful Ends, Const. Project, June 21, 2010, *available at* http://www.constitutionproject.org/news/2010/06212010n_constitution.php; Press Release, Charity and Security Network, Supreme Court Upholds Ban on Peaceful Conflict Resolution Support To Terrorist Groups, June 21, 2010, *available at* http://www.charityandsecurity.org/news/Supreme_Court_Ban_Peaceful_Conflict_Resolution_Support_Terrorist_Groups.

55 *See Humanitarian Law Project*, 130 S. Ct. at 2731-2743.

56 *See Muslim Charities and the War on Terror*, *supra* note 26, at 2.

57 Just weeks after the Supreme Court's ruling undermining the independence of American civil society and human rights advocacy in *Humanitarian Law Project*, Secretary of State Hillary Clinton touted the necessity of a strong civil society as an "essential element[] of a free nation." *See* Sec'y of State Hillary Clinton, Speech at the Community of Democracies, *Civil Society: Supporting Democracy in the 21st Century*, July 3, 2010, *available at* http://www.state.gov/secretary/rm/2010/07/143952.htm.

58 *But see Blocking Faith*, *supra* note 15, at 74 (describing well-known case of Palestinian American and former imam of Georgia mosque who pleaded guilty in August 2006 to charges of material support for terrorism for donations made to Holy Land Foundation).

59 Collateral prosecution of American Muslim donors involves arrests or indictments that, while not officially related to the donors' contributions, are speculated to have been prompted by their donations or charitable giving. *See Blocking Faith*, *supra* note 15, at 73.

60 *See id.* at 73-75.

61 *See generally* Aziz, *supra* note 30. *See also* Eric Gorski, *supra* note 25 (quoting a local imam stating "IRS scrutiny of giving to Islamic charitable organizations had a chilling effect on donations" causing the mosque to shut down).

62 *See Blocking Faith*, *supra* note 15, at 69-70 (citing a 2005 investigation by the U.S. Senate Committee

on Finance that reviewed financial records given to the IRS including donor lists of two dozen Muslim charities).

63 *Id.* at 73-74 (highlighting the case of Jesse Maali who was prosecuted for violations of immigration, employment, and tax law after his large donations to Muslim charities came to the attention of federal agents).

64 *Id.* at 69.

65 *Id.* at 69-73.

66 *See, e.g.*, Oralandar Brand Williams, *CAIR says Muslim Americans harassed when crossing border*, Detroit News, Mar. 25, 2011, *available at* http://www.detnews.com/article/20110325/METRO/103250392/CAIR-says-Muslim-Americans-harassed-when-crossing-border (reporting on call for federal investigation into the routine harassment of Arab and Muslim Americans at U.S. border brossings); Council on Am.-Islamic Relations, *The Status of Muslim Civil Rights in the United States: Seeking Full Inclusion* 19, 27 (2009), *available at* http://www.cair.com/Portals/0/pdf/CAIR-2009-Civil-Rights-Report.pdf (noting cases of Muslims stopped at border crossings and detained for hours with no explanations).

67 *Id.* at 69.

68 *See, e.g.*, Islamic Singer Sentenced in False Statements Case, ABC News, Dec. 14, 2010, *available at* http://abcnews.go.com/Entertainment/wireStory?id=12398415 (reporting that a prominent Muslim singer, who was also a Holy Land Foundation representative in 1997 and 1998, pleaded guilty to making false statements during immigration process and was ordered deported).

69 *See infra* note 13.

70 *Id.*; *see also* Mosque shuns FBI informant, Al Jazeera, Dec. 7, 2010, *available at* http://english.aljazeera.net/news/americas/2010/12/201012520148175694.html; Mosque Infiltration Feeds Muslims' Distrust of FBI, CAIR, Dec. 5, 2010, *available at* http://www.cair.com/ArticleDetails.aspx?mid1=674&&ArticleID=26699&&name=n&&currPage=1.

71 *See* Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper's Magazine, August 2011, *available at* http://harpers.org/archive/2011/08/0083545.

72 *See id.*

73 *See, e.g.*, *Blocking Faith*, *supra* note 15, at 69; Bartosiewicz, *supra* note 72 (reporting FBI offered "cooperation deal" to man accused of assisting in obtaining fraudulent identification documents in exchange for his "rooting out terrorist threats").

74 *Id.* at 75.

75 *See, e.g.*, David Cole, *Guilt by Association Squared: Extending the Bounds of the 'Material Support' Statute*, Am. Const. Society, Nov. 8, 2010, *available at* http://www.acslaw.org/acsblog/node/17509.

76 *See, e.g.*, Nonprofit Groups End Talks With Treasury about Ineffectual Guidelines, Charity and Security Network, Dec. 1, 2010, *available at* http://www.charityandsecurity.org/news/Nonprofit_Groups_End_Talks_With_Treasury_about_Ineffectual_Guidelines.

77 Designated organizations may be Foreign Terrorist Organizations (FTO) listed by the Secretary of State or Specially Designated Global Terrorists (SDGT) listed by the Department of Treasury. *See* Aziz, *supra* note 30, at 51-55.

78 Charity and Security Network, *Model Policies for Fair Procedures for Listing and Delisting U.S. Charities*, Aug. 3, 2011, *available at* http://www.charityandsecurity.org/solutions/model_due_process_procedures_charities. *But see* 31 C.F.R. 501.807 (permitting designated entities to seek administrative reconsideration by federal government after designation and property has been frozen which allows the entity to add evidence to the administrative record considered by a federal court if the designation is appealed). *See generally* Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1250 (D. Or. 2008) (allowing charity to submit rebuttal evidence into the administrative record).

79 *E.g.*, Ron Suskind,, The Price of Loyalty: George W. Bush, the White House, and the Education of Paul

O'Neill (2004); Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on the Separation of Powers*, 6 Cardozo Pub. L. Pol'y & Ethics J. 547 (2008).

80 *See, e.g.*, Testimony of Chip Poncy, U.S. Senate Homeland Security and Governmental Affairs Committee, May 10, 2007, *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp404.aspx.

81 *See Principles and Procedures for Release of Frozen Funds for Charitable Purposes*, Charity and Security Network, Jan. 15, 2008, *available at* http://www.charityandsecurity.org/Solution/Procedures_Release_Funds_Charity.

82 For extensive information and in-depth analysis about the issues and proposed solutions, see generally the Charity and Security Network available at www.charityandsecurity.org.

83 *See* Walter Griffin, *Report: 'Dirty bomb' parts found in slain man's home*, Bangor Daily News, Feb. 10, 2009, *available at* http://new.bangordailynews.com/2009/02/10/politics/report-dirty-bomb-parts-found-in-slain-mans-home/.

84 *See, e.g.*, Michael Brick, *Man Crashes Plane Into Texas I.R.S. Office*, N.Y.Times, Feb. 18, 2010, *available at* http://www.nytimes.com/2010/02/19/us/19crash.html.

85 *See, e.g.*, David A. Fahrenthold and Clarence Williams, *Tucson shooting suspect Jared Loughner appears to have posted bizarre messages*, Wash. Post, Jan. 9, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010803961.html (reporting Loughner "left at trail of bizarred and anti-government messages on the Internet").

86 *See, e.g.*, Pete Yost, *Senate Panel Votes to Extend Surveillance Law*, Associated Press, Aug. 2, 2011, *available at* http://www.google.com/hostednews/ap/article/ALeqM5hMme_Csz2MhqEf5YT5fGvWrLW0xA?docId=a8e634f0f45f44918bf683c97eb5dbea ("The 2008 amendments to the Foreign Intelligence Surveillance Act, which were bitterly disputed in Congress, allow the government to obtain from a secret court broad, yearlong intercept orders that target foreign groups and people overseas, raising the prospect that phone calls and emails between those foreign targets and innocent Americans in this country also will be collected and reviewed.").

87 *See* Cole & Lobel, *supra* note 1.

88 *See, e.g.*, Meg Stalcup and Joshua Craze, *How We Train Our Cops to Fear Islam*, Wash. Monthly, Mar.-Apr. 2011, *available at* http://www.washingtonmonthly.com/features/2011/1103.stalcup-craze.html.

89 Sahar F. Aziz, *Trapped Between Two Patriarchies: The Transition of the Muslim Woman's "Veil" from a Symbol of Subjugation to a Symbol of Terror* (forthcoming).

90 *See* FBI Infiltrator of Anti-War Group Exposed As More Activists Face Subpoenas, Charity and Security Network, Jan. 18, 2011, *available at* http://www.charityandsecurity.org/news/FBI_Infiltrator_AntiWar_Group_Exposed_Activists_Subpoenas.

91 *See, e.g.*, Shahid Buttar, *Preventive Detention, at What Cost?*, Huffington Post, July 13, 2009, *available at* http://www.huffingtonpost.com/shahid-buttar/preventive-detention-at-w_b_230302.html.

92 *See* King Hearing Serves As 'Political Circus,' Not Problem Solving, Muslim Public Affairs Council, Mar. 10, 2011, *available at* http://www.mpac.org/programs/government-relations/king-hearing-serves-as-political-circus-not-problem-solving.php.

93 *See, e.g.*, ACLU and Broad Coalition Tell Rep. King of Concerns About Muslim "Radicalization" Hearing, Mar. 8, 2011, *available at* http://www.aclu.org/free-speech-national-security/aclu-and-broad-coalition-tell-rep-king-concerns-about-muslim-radicaliz.

94 *See* Miranda Oshige McGowan and James Lindrgren, *Testing the "Model Minority Myth"* 100 Nw. U. L. Rev. 331 (2006).

95 *See, e.g.*, Senator Rand Paul's Letter of Opposition to the Patriot Act, Feb. 15, 2011, *available at* http://www.randpaul2010.com/2011/02/senator-rand-paul's-letter-of-opposition-to-the-patriot-act/.

SEPTEMBER 2011

POLICY BRIEF

ISPU

RESEARCH MAKING AN IMPACT

ISPU is an independent, nonpartisan think tank and research organization committed to conducting objective, empirical research and offering expert policy analysis on some of the most pressing issues facing our nation, with an emphasis on those issues related to Muslims in the United States and around the world. Our research aims to increase understanding of American Muslims while tackling the policy issues facing all Americans, and serves as a valuable source of information for various audiences. ISPU scholars, representing numerous disciplines, offer context-specific analysis and recommendations through our publications. The diverse views and opinions of ISPU scholars expressed herein do not necessarily state or reflect the views of ISPU, its staff, or trustees.

NAVIGATING A POST ★ 9/11 WORLD

This policy brief is a part of the Institute for Social Policy and Understanding's series of publications, events, and conferences planned across the country to reflect on the tenth anniversary of September 11, 2001. "Navigating a Post 9/11 World: A Decade of Lessons Learned" will explore several of the most pressing policy issues facing the United States and the American Muslim community, and present forward thinking and inclusive policy recommendations for the future. The series will address the threat of terrorism, the policy shifts over the past decade, and the challenges and opportunities for the American Muslim community. This series is possible thanks to the generous support of the Rockefeller Brothers Fund, Mohamed and Rania Elnabtity, and the Khan Family Foundation.

Institute *for* Social Policy *and* Understanding
1225 Eye St, NW Suite 307
Washington, D.C. 20005
www.ispu.org

NON PROFIT ORG.
U.S. POSTAGE
PAID
WESTLAND, MI
PERMIT NO. 104

© 2011 Institute for Social Policy and Understanding. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Institute for Social Policy and Understanding. The Institute for Social Policy and Understanding normally does not take institutional positions on public policy issues. The views presented here do not necessarily reflect the views of the institute, its staff, or trustees.

§ 2339B. Providing material support or resources to designated foreign terrorist organizations
United States Code Annotated Title 18. Crimes and Criminal Procedure Effective: December 1, 2009 *(Approx. 5 pages)*

Construction with other laws
Crime of violence
Due process
First amendment
Indictment
Persons liable
Plea
Pretrial detention
Release condition
Sentencing

Notes of Decisions (54)

Sort By: Procedural Order

Constitutionality

Statute prohibiting knowingly providing material support to foreign terrorist organizations did not violate freedom of speech as applied to organizations and individuals who allegedly sought to provide organizations that had been designated as foreign terrorist organizations with support for only lawful, nonviolent activities, such as training members on how to use humanitarian and international law to peacefully resolve disputes and on how to petition for humanitarian relief before United Nations and other representative bodies, and engaging in political advocacy on behalf of those organizations' ethnic groups; significant weight was due considered judgment of Congress and Executive that providing material support to designated foreign terrorist organization, even seemingly benign support, bolstered terrorist activities of that organization. Holder v. Humanitarian Law Project, U.S.2010, 130 S.Ct. 2705, 177 L.Ed.2d 355.Constitutional Law⚷1868War And National Emergency⚷1123

Statute prohibiting material support for a known terrorist organization does not violate due process; statute does not penalize mere association with a foreign terrorist organization, and the "personal guilt" requirement of the Due Process Clause is satisfied by the knowing supply of material aid to a terrorist organization. U.S. v. Al Kassar, C.A.2 (N.Y.) 2011, 660 F.3d 108, certiorari denied 132 S.Ct. 2374.Constitutional Law⚷4509(1)War and National Emergency⚷1123

AEDPA prohibition against providing material support or resources to foreign terrorist organization does not violate First Amendment's guarantees of freedom of speech and association; statute controls conduct rather than communication. People's Mojahedin Organization of Iran v. Department of State, C.A.D.C.2003, 327 F.3d 1238, 356 U.S.App.D.C. 101.Constitutional Law⚷Constitutional Law⚷War And National Emergency⚷

Indictment alleging that defendants knowingly combined, conspired, and agreed to provided material support to a designated foreign terrorist organization (FTO) by soliciting contributions on behalf of the FTO, that one defendant was the leader of the Los Angeles cell of the FTO, that the FTO leadership directed fund-raising activities, that some defendants solicited donations for the FTO from various unwitting individuals, that the Los Angeles cell leader received directions and guidance from the FTO about its activities in the Los Angeles area, and that the cell leader regularly communicated with FTO leadership, was sufficient inform the defendants of the specific charge of providing material support to a designated FTO, as required by the Fifth and Sixth Amendments. U.S. v. Afshari, C.D.Cal.2009, 635 F.Supp.2d 1110.War And National Emergency⚷1131

Prohibitions against the conduct of providing material support or resources to foreign terrorist organization did not unconstitutionally impose guilt by association; the statute did not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group, but rather prohibited the act of giving material support, and there was no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions, nor was there a right to provide resources with which terrorists could buy weapons and explosives. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.Constitutional Law⚷1440War And National Emergency⚷1123

Statute pursuant to which doctor was indicted for conspiring to provide, and providing and attempting to provide, "material support or resources" to al Qaeda in form of medical support to wounded jihadists was not vague under Due Process Clause or overbroad under First Amendment; although "medicine" was excluded from definition of "material support or resources," "expert advice or assistance" was included, and reasonable doctor should have known that charged conduct would constitute provision of such "expert advice or assistance." U.S. v. Shah, S.D.N.Y.2007, 474 F.Supp.2d 492, affirmed 634 F.3d 127, certiorari denied 132 S.Ct. 833, 181 L.Ed.2d 542.Conspiracy⚷23.5Constitutional Law⚷4509(6)War And National Emergency ⚷1123

Standard announced in *Buckley v. Valeo*, under which regulation of fundraising does not violate First Amendment if closely drawn to further sufficiently important government interest, applies to determine constitutionality of prohibitions on contributions to foreign organizations, under Antiterrorism and Effective Death Penalty Act (AEDPA) and International Emergency Economic Powers Act (IEEPA). U.S. v. Al-Arian, M.D.Fla.2004, 308 F.Supp.2d 1322, modification denied 329 F.Supp.2d 1294.Constitutional Law⚷

Statute prohibiting conspiracy and related substantive offense of providing material support or resources to foreign terrorist organization (FTO) was unconstitutionally vague with regard to the statute's prohibition on "providing" material support or resources in the form of "communications equipment" and "personnel;" by criminalizing the mere use of phones and other means of communication, the statute provided neither notice nor standards for its application, and it was not clear from statute what behavior constituted an impermissible provision of personnel to an FTO. U.S. v. Sattar, S.D.N.Y.2003, 272 F.Supp.2d 348.Constitutional Law⚷1133War And National Emergency⚷1123

Federal statute criminalizing provision of material support to foreign terrorist organizations was not unconstitutionally vague when applied to defendants accused of training at known terrorist organization's camp; finding of "material support or resources" could be based on offering one's services to terrorist organization and allowing one's self to be indoctrinated and trained as a "resource" in that organization's beliefs and activities. U.S. v. Goba, W.D.N.Y.2002, 220 F.Supp.2d 182, motion denied 240 F.Supp.2d 242.Constitutional Law⚷4509(1)War And National Emergency⚷1123

Criminal charges brought against terrorism defendant who allegedly fought for al Qaeda organization and Taliban did not impermissibly infringe upon defendant's First Amendment right to freedom of association, since constitutional protections did not extend to provision of services and/or support to terrorist organizations. U.S. v. Lindh, E.D.Va.2002, 212 F.Supp.2d 541.Constitutional Law🔑1440

First amendment

Statute prohibiting knowingly providing material support to foreign terrorist organizations did not violate rights of association of organizations and individuals who allegedly sought to provide organizations that had been designated as foreign terrorist organizations with support for only lawful, nonviolent activities; statute penalized material support of, not mere association with, foreign terrorist organization, and any burden on plaintiffs' freedom of association, in preventing them from providing support to designated terrorist organizations, but not to other groups, was justified. Holder v. Humanitarian Law Project, U.S.2010, 130 S.Ct. 2705, 177 L.Ed.2d 355.Constitutional Law🔑1440War And National Emergency🔑1123

Statute prohibiting the provision of material support, in the form of financial contributions, to a designated foreign terrorist organization (FTO) did not impermissibly restrict the First Amendment right to free speech with respect to defendants' sending of monetary donations to FTO. U.S. v. Afshari, C.D.Cal.2009, 635 F.Supp.2d 1110.Constitutional Law🔑1868War And National Emergency🔑1123

Anti-terrorism act provision precluding defendant from raising at trial the question of whether Iranian dissident organization's designation as an Foreign Terrorist Organization (FTO) was correct and constitutional did not violate defendant's First Amendment rights; defendant was charged with knowingly providing personnel to an Iranian dissident organization, not with engaging in speech. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.War And National Emergency🔑

Term "personnel," as defined in statute prohibiting the provision of material support or resources to a designated foreign terrorist organization (FTO), was vague, within the meaning of the First Amendment, as applied to defendant who, after allegedly participating in an FTO training camp in Afghanistan, remained in contact with FTO associates after returning to Canada, absent additional evidence tying such conduct to conduct that would constitute provision of "personnel" under the statute. U.S. v. Warsame, D.Minn.2008, 537 F.Supp.2d 1005.Constitutional Law🔑1170War And National Emergency🔑1123

Prohibitions of contributions to terrorist organizations, contained in Antiterrorism and Effective Death Penalty Act (AEDPA) and International Emergency Economic Powers Act (IEEPA), did not violate First Amendment rights of potential contributors; statutes were closely drawn to further sufficiently important government interest in stopping spread of global terrorism. U.S. v. Al-Arian, M.D.Fla.2004, 308 F.Supp.2d 1322, modification denied 329 F.Supp.2d 1294.War And National Emergency🔑

Statute prohibiting conspiracy and related substantive offense of providing material support or resources to an organization designated as to foreign terrorist organization (FTO) did not violate defendant's First Amendment associational rights; material support restriction was not aimed at interfering with the expressive component of defendant's conduct but at stopping aid to terrorist groups. U.S. v. Sattar, S.D.N.Y.2003, 272 F.Supp.2d 348.Constitutional Law🔑1440War And National Emergency🔑1123

Due process

Statute criminalizing conspiring to provide material support or resources to designated terrorist organizations did not violate due process by criminalizing mere membership in a terrorist organization, and thus district court had jurisdiction over indictment charging defendants with that offense; violation of statute required provision of material support to a designated terrorist organization with knowledge that the organization was a designated terrorist organization or had engaged or was engaged in terrorism. U.S. v. Al Kassar, S.D.N.Y.2008, 582 F.Supp.2d 488.Constitutional Law 🔑 4509(6)War And National Emergency 🔑 1123

Prohibitions against the conduct of providing material support or resources to foreign terrorist organization (FTO) did not permit criminal liability to attach in the absence of personal guilt, and therefore did not violate due process; punishment only attached when a donor provided material support to an FTO, knowing either that the organization was a designated FTO, or that it engaged or engages in terrorist activity or terrorism, and thus made a knowledgeable choice to violate the law. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.Constitutional Law 🔑 4509(1)War And National Emergency 🔑 1123

Statute prohibiting the provision of material support or resources to a designated foreign terrorist organization (FTO), knowing that the organization had been designated an FTO or knowing that it had engaged or engaged in terrorist activity, satisfied minimal requirements of due process, even if the defendant did not specifically intend the underlying terrorist activity. U.S. v. Warsame, D.Minn.2008, 537 F.Supp.2d 1005.Constitutional Law 🔑 4509(1)War And National Emergency 🔑 1123

Jury determination of guilt

Defendant was not deprived of his due process and Sixth Amendment rights to a jury determination of guilt, in his prosecution for violating statute prohibiting the provision of material support or resources to a designated foreign terrorist organization (FTO), by his inability to challenge the designation of that organization as an FTO; validity of the organization's designation as an FTO was not an element of the offense. U.S. v. Warsame, D.Minn.2008, 537 F.Supp.2d 1005.Constitutional Law 🔑 4752Jury 🔑 34(7)War And National Emergency 🔑 1131

Overbroad

Statute providing prohibitions against the conduct of providing material support or resources to foreign terrorist organization (FTO) was not unconstitutionally overbroad; the statute prohibited the conduct of providing "material support" to an FTO, which avoided the concern that an individual could face criminal sanctions for mere association with an FTO. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.War And National Emergency 🔑 36

Vagueness

Statute prohibiting knowingly providing material support to foreign terrorist organizations was not vague, in violation of due process, in defining "material support" to include "training," "service," "personnel" and "expert advice or assistance"; statutory definitions increased clarity of these terms, and knowledge requirement further reduced potential for vagueness. Holder v. Humanitarian Law Project, U.S.2010, 130 S.Ct. 2705, 177 L.Ed.2d 355.Constitutional Law🔑4509(1)War And National Emergency🔑1123

Statute prohibiting providing and conspiring to provide material support to terrorist organizations was not facially vague or overbroad for First Amendment purposes, since statute left persons free to say anything they wished on any topic, including terrorism, and did not prohibit independent advocacy of any kind. U.S. v. Farhane, C.A.2 (N.Y.) 2011, 634 F.3d 127, certiorari denied 132 S.Ct. 833, 181 L.Ed.2d 542.Constitutional Law🔑1868War And National Emergency🔑1123

Indictment charging defendants with providing material support to a designated foreign terrorist organization (FTO), and specifically alleging that defendants engaged in fundraising, under the direction and control of the FTO, at an airport on behalf of the FTO, knowing that the FTO had received such designation, did not implicate First Amendment conduct or speech, and thus, defendants could not successfully challenge the criminal statute prohibiting providing of material support to a designated FTO for vagueness; the indictment alleged that it was the FTO that engaged in advocacy, and it did not allege that defendants themselves engaged in advocacy, but merely acted under the FTO's direction and control. U.S. v. Afshari, C.D.Cal.2009, 635 F.Supp.2d 1110.Constitutional Law🔑1868War And National Emergency🔑1123

Statute providing prohibitions against the conduct of providing material support or resources to foreign terrorist organization (FTO) was not impermissibly vague as to the term "personnel," and therefore was not void for vagueness; the defendant, knowing that the Iranian dissident organization was a designated FTO, allegedly taught English classes, translated documents, and was assigned to the Political Department, conduct that was unambiguously encompassed within the statute. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.Constitutional Law 🔑4509(1)War And National Emergency🔑1123

Construction with other laws

For purposes of Bail Reform Act, each defendant charged with conspiring to knowingly provide material support and resources to a foreign terrorist organization and substantive offense of knowingly and unlawfully providing material support and resources to foreign terrorist organization posed a risk of flight if released; each defendant demonstrated the ability to sustain himself abroad for an extended period of time through his own or others' means. U.S. v. Goba, W.D.N.Y.2003, 240 F.Supp.2d 242.Bail 🔑 42

Crime of violence

Charge of providing material support or resources to a foreign terrorist organization constituted a "crime of violence" under Bail Reform Act. U.S. v. Goba, W.D.N.Y.2003, 240 F.Supp.2d 242.Bail 🔑 43

Material support or resources

Law enforcement officer had probable cause to believe that defendant committed the crime of providing material support or resources to foreign terrorist organizations, justifying warrantless arrest of defendant in public place, under the Fourth Amendment, notwithstanding officers' stated reason for arresting him was belief that defendant violated immigration laws; known terrorist operative told officers that defendant told him that he intended to shoot up a mall with an automatic weapon, computer records indicated that defendant sent e-mails to known terrorist about purchasing surveillance equipment, officers had independent corroboration that defendant had relationships with known terrorists, and telephone activity from defendant's phone number showed calls to approximately 40 other numbers connected to known terrorism cases. U.S. v. Abdi, C.A.6 (Ohio) 2006, 463 F.3d 547, rehearing and rehearing en banc denied, certiorari denied 127 S.Ct. 2910, 551 U.S. 1104, 168 L.Ed.2d 245.Arrest🔑63.4(7.1)

Allegations by United States citizen who was wounded in shooting allegedly perpetrated by members of terrorist organization that Jordanian bank provided material support to the terrorist organization and its members, in the form of financial services and other assistance, that the bank unlawfully provided or collected funds for terrorist organization with knowledge, intent, or reckless disregard for organization's use of such funds to facilitate acts of terrorism, and that the bank's conduct resulted in the shooting of the United States citizen stated claims against bank for violations of the civil remedy provision of the Anti-Terrorism Act (ATA). Gill v. Arab Bank, PLC, E.D.N.Y.2012, 2012 WL 4960358.War and National Emergency🔑1132(1)

Allegations that bank knowingly and intentionally provided services to organizations it knew to be terrorist organizations, that plaintiffs were injured by an overt act committed in furtherance of the common scheme, and that bank played a role in plan to reward terrorists and knew that groups to which it provided services were engaged in terrorist activities and that funds it received were to be used for conducting acts of international terrorism, were sufficient to state claims for violations of Anti-Terrorism Act (ATA) provisions prohibiting providing material support or resources to terrorists and financing terrorism. Almog v. Arab Bank, PLC, E.D.N.Y.2007, 471 F.Supp.2d 257.War And National Emergency🔑1132(1)

Allegations in complaint brought by insurance companies who represented victims of the attacks on September 11, 2001, that Saudi bank provided material support to the al Qaeda terrorists who perpetrated the attacks under concerted action liability theories of conspiracy and aiding and abetting, failed to state a claim under Anti-Terrorism Act (ATA); complaint failed to present a sufficient causal connection between the alleged support and the injuries suffered by plaintiffs. In re Terrorist Attacks on September 11, 2001, S.D.N.Y.2006, 462 F.Supp.2d 561, reconsideration denied 471 F.Supp.2d 444.War And National Emergency🔑1132(1)

Victims of terrorist attacks in Israel who sued British bank, alleging that bank helped facilitate activities of foreign terrorist organization (FTO), alleged sufficient facts to establish that bank knowingly provided direct material support or resources to FTO, for purposes of statute providing civil remedies for terrorism victims; complaint averred that bank provided financial services to purported charity organizations controlled by FTO and run by its agents. Weiss v. National Westminster Bank PLC, E.D.N.Y.2006, 453 F.Supp.2d 609.War And National Emergency🔑1132(1)

Defendant who intended to go to Afghanistan to fight for the Taliban, who were the protectors of al-Qaeda, would not thereby provide "material support or resources" to al-Qaeda, and therefore he was not guilty of conspiracy to provide material support to al-Qaeda. U.S. v. Khan, E.D.Va.2004, 309 F.Supp.2d 789, affirmed in part, remanded in part 461 F.3d 477, as amended, certiorari denied 127 S.Ct. 2428, 550 U.S. 956, 167 L.Ed.2d 1130, appeal from denial of post-conviction relief dismissed 396 Fed.Appx. 971, 2010 WL 3938213, appeal from denial of post-conviction relief dismissed 451 Fed.Appx. 262, 2011 WL 5008572.Conspiracy🔑47(3.1)

Knowledge and intent

Allegation that bank at least knew that it provided financial services to an organization that had previously engaged in terrorism and terrorist activities satisfied state-of-mind element of claim under Anti-Terrorism Act (ATA) provision prohibiting providing material support for a terrorist organization. Wultz v. Islamic Republic of Iran, D.D.C.2010, 755 F.Supp.2d 1.War And National Emergency 🔑 1132(1)

Allegations that international financial institution knew that ultimate beneficiary of wire transfers made by its client, an alleged fundraising organization for terrorist group, was Foreign Terrorist Organization, was sufficient for widow and children of Canadian citizen and Israeli resident killed in terrorist attack on Jerusalem bus to state that institution provided support for "foreign terrorist organization" in violation of Anti-Terrorism Act (ATA). Goldberg v. UBS AG, E.D.N.Y.2009, 660 F.Supp.2d 410, reconsideration denied 690 F.Supp.2d 92.War And National Emergency 🔑 1132(1)

Statute imposing criminal penalties for knowingly providing material support to a designated foreign terrorist organization (FTO) did not contain a requirement of specific intent to further the FTO's terrorist activities. U.S. v. Warsame, D.Minn.2008, 537 F.Supp.2d 1005.War And National Emergency 🔑 1131

Statute prohibiting providing material support or resources to a terrorist organization required government to prove beyond a reasonable doubt that the defendant knew the organization was a Foreign Terrorist Organization (FTO) or had committed unlawful activities that caused it to be so designated, and what he was furnishing was material support, with specific intent that the support would further the illegal activities of the FTO. U.S. v. Al-Arian, M.D.Fla.2004, 329 F.Supp.2d 1294.War And National Emergency 🔑 1131

Pretrial detention

Each defendant's attendance and training at foreign terrorist organization's camp, in and of itself, rendered each defendant a danger to the community, thus justifying their pretrial detention pending trial for conspiring to knowingly provide material support and resources to a foreign terrorist organization and substantive offense of knowingly and unlawfully providing material support and resources to foreign terrorist organization; additionally, discovery of weapons or indoctrination materials, or both, through searches of defendants' residences further supported a finding of dangerousness. U.S. v. Goba, W.D.N.Y.2003, 240 F.Supp.2d 242.Bail 🔑 42

Release condition

Despite any conditions that could be placed on her during her release, defendant, indicted for, inter alia, providing material support to a foreign terrorist organization, posed an unreasonable danger to the community, as would support her detention without bond pending trial, where her offense was serious and carried a maximum term of imprisonment of ten years or more; weight of the evidence against her, which included recorded telephone conversations and witness testimony regarding those calls, was strong. U.S. v. Vergara, D.D.C.2009, 612 F.Supp.2d 36.Bail 🔑 49(3.1)

No release condition or combination of release conditions could be imposed to eliminate the risk that defendants would flee the district or the danger that defendants posed to the community, thus justifying their pretrial detention pending trial for conspiring to knowingly provide material support and resources to a foreign terrorist organization and substantive offense of knowingly and unlawfully providing material support and resources to foreign terrorist organization. U.S. v. Goba, W.D.N.Y.2003, 240 F.Supp.2d 242.Bail 42

Indictment

Allegations that United States oil companies and individuals in the oil business provided financial assistance to terrorists in form of kickbacks to "front companies," which were then forwarded to Saddam Hussein, in violation of United Nations "Oil for Food" program, and later diverted to make reward payments to families of terrorists, and that it was foreseeable that Hussein would use kickbacks to support terrorist attacks, were sufficient to support inference that companies and individuals knew money paid in kickbacks would be used to support terrorist activity in Israel that targeted American nationals, as required to state claims under Antiterrorism Act (ATA), based on aiding and abetting liability and primary liability, arising from terrorist attacks in Israel. Abecassis v. Wyatt, S.D.Tex.2011, 785 F.Supp.2d 614.War And National Emergency1132(1)

Indictment charging defendants with providing material support to a designated foreign terrorist organization (FTO) did not present either an ex post facto concern or bill of attainder, despite Secretary of State's later redesignation of the FTO as such, where defendants' alleged conduct occurred when the prior FTO designations were in effect. U.S. v. Afshari, C.D.Cal.2009, 635 F.Supp.2d 1110.Constitutional Law1100(2)Constitutional Law2802War And National Emergency1131

Prosecution of defendant for providing material support, specifically personnel, to Iranian dissident organization that had been designated a foreign terrorist organization (FTO) was not so outrageous as to warrant dismissal of indictment; a federal grand jury returned the indictment against defendant based on adequate information, and, the government allegedly had witness testimony and videotape evidence to support the charge against defendant. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.Indictment And Information144.1(3)

Count alleging that defendant conspired knowingly to provide material support to designated Foreign Terrorist Organization (FTO) adequately alleged mens rea as element of crime; indictment averred that defendant knowingly provided material support and that he knew that organization at issue was either designated FTO or engaged in terrorist activities. U.S. v. Abdi, S.D.Ohio 2007, 498 F.Supp.2d 1048.Conspiracy43(6)

Indictment adequately alleged conspiracy to provide designated foreign terrorist organization with material support, in violation of Antiterrorism and Effective Death Penalty Act (AEDPA), when indictment gave notice of types of material support provided, and reincorporated relevant sections from overt acts portion. U.S. v. Al-Arian, M.D.Fla.2004, 308 F.Supp.2d 1322, modification denied 329 F.Supp.2d 1294.Conspiracy43(5)Conspiracy43(6)

Notice

Indictment charging defendant with knowingly providing material support and resources, including personnel, to Iranian dissident organization and providing the approximate time span and locations of the offense, gave defendant adequate notice of the charges; the term "personnel" was already included in the indictment and therefore defendant could be certain that it was considered by the grand jury, and, at the hearing on the matter, the government stated that it would only be relying on supplying personnel, and not any of the other prohibited conduct listed in the statute. U.S. v. Taleb-Jedi, E.D.N.Y.2008, 566 F.Supp.2d 157.Indictment And Information 71.4(1)

Persons liable

Allegations that international financial institution was liable for knowingly providing financial services to alleged terrorist group was sufficient for widow and children of Canadian citizen and Israeli resident killed in terrorist attack on Jerusalem bus to state claim that such violation constituted "act of intentional terrorism," as required for institution to be liable under civil liability provisions of Anti-Terrorism Act (ATA). Goldberg v. UBS AG, E.D.N.Y.2009, 660 F.Supp.2d 410, reconsideration denied 690 F.Supp.2d 92.War And National Emergency 1132(1)

Purported failure of bank to comply with reporting requirements of Anti-Terrorism Act (ATA), pertaining to alleged transfers of funds to and from agents of terrorist organization, did not give rise to criminal liability, and thus was not actionable under ATA; private right of action arose from injuries caused by act of "international terrorism" rather than reporting obligations, and imposition of civil penalties was within discretion of Attorney General. Linde v. Arab Bank, PLC, E.D.N.Y.2004, 353 F.Supp.2d 327.War And National Emergency 1132(1)

Sentencing

Below guidelines sentence of 92 months was appropriate penalty for defendant's conviction, upon guilty plea, to single count of providing material support to designated terrorist organization; even though defendant admittedly trained at two terrorist training camps and had access to al Qaeda leadership, there was nothing that demonstrated that defendant was a part of a specific plot against the United States and very little that suggested he was especially useful to al Qaeda either during his training in the Middle East or upon his return to North America, and defendant's conditions of confinement were significantly more onerous than the conditions faced by the ordinary pretrial detainee. U.S. v. Warsame, D.Minn.2009, 651 F.Supp.2d 978.Sentencing And Punishment 67Sentencing And Punishment 117War And National Emergency 1131

Weight and sufficiency of evidence

Evidence was sufficient to support defendant's conviction of conspiracy to kill U.S. officers and to materially support a known terrorist organization; defendant told undercover Drug Enforcement Administration (DEA) agents he knew coconspirator was negotiating a weapons deal with terrorist organization, defendant told the DEA agents he knew organization was a terrorist organization, defendant told the DEA agents he knew the weapons deal included anti-aircraft missiles (SAMs), defendant told the DEA agents he knew organization intended to use the weapons they were buying to kill U.S. military personnel, defendant told the DEA agents he facilitated the weapons deal to get a commission, defendant was present during key negotiations in the weapons deal, defendant stayed at coconspirator's mansion during the negotiations with no apparent purpose other than to participate in them, defendant advised the DEA agents how to successfully complete the weapons deal with coconspirator, coconspirator told the DEA agents that defendant was instrumental to his decision to negotiate with them, and defendant went to Romania for the purpose of receiving the final payment for the weapons that coconspirator sold to the DEA agents, which included SAMs. U.S. v. Al Kassar, C.A.2 (N.Y.) 2011, 660 F.3d 108, certiorari denied 132 S.Ct. 2374.Conspiracy28(3)

Evidence was sufficient to support defendant's conviction of conspiracy to provide material support to known terrorist organization; testimonial evidence established that defendant and co-defendant had long voiced interest in supporting jihad and mujahedeen, and that co-defendant had proposed to undercover federal agent that he and defendant would join terrorist organization to support that organization's pursuit of jihad. U.S. v. Farhane, C.A.2 (N.Y.) 2011, 634 F.3d 127, certiorari denied 132 S.Ct. 833, 181 L.Ed.2d 542.Conspiracy47(3.1)

Evidence about discussion between United Kingdom bank's top management and compliance officers as to whether to retain Palestinian charity which had been designated by Office of Foreign Assets Control as Specially Designated Global Terrorist (SDGT) and designated by United States as terrorist organization, followed by bank's ultimate decision to retain charity as client, did not create fact issue whether bank knew and was deliberately indifferent about its regulatory obligations regarding accounts that were allegedly used to finance and support terrorist groups, as required for victims of attacks by Palestinian terrorist organization to survive summary judgment on claim that bank collected and transmitted funds that it knew were used to fund terrorist activities, in violation of Antiterrorism Act; rather than dismissing designations of charity as providing financial support to organization, bank reported designation to British authorities and began extensive dialogue with authorities regarding designation of charity as terrorist group, investigator noted difference of opinion between United States and British government as reflection of governments' different policies relating to Israeli/Palestinian conflict, rather than different definitions of "terrorism," and stray comments regarding difference of opinion between United States and British government did not in any way diminish diligence that bank undertook in investigating, disclosing, and monitoring charity's accounts, which produced no evidence linking charity to organization. Weiss v. National Westminster Bank, PLC, E.D.N.Y.2013, 2013 WL 1364170.Federal Civil Procedure2507.5

Admissibility of evidence

District court did not manifestly err in allowing expert to testify about terrorist organization and publisher of jihadist videotape offered in prosecution's direct case, in prosecution for providing and conspiring to provide material support to terrorist organization; testimony had considerable factual basis, was helpful to jury, was relevant to issues at trial, and did not reach beyond government's Rule 16 proffer. U.S. v. Farhane, C.A.2 (N.Y.) 2011, 634 F.3d 127, certiorari denied 132 S.Ct. 833, 181 L.Ed.2d 542.Criminal Law⚷474.5

Plea

Plea of guilty by defendant, whose native language was Spanish, to charge of conspiracy to provide material support to a foreign terrorist organization, had been made knowingly and intelligently, as required by due process clause, where Spanish-language interpreter had been used by her attorney throughout process, plea agreement and agreed-upon statement of facts had been translated into Spanish and provided to defendant in Spanish and English, court conducted careful colloquy on stipulated facts and defendant had been given opportunity to correct any inaccuracies, and she was sentenced to range as stated in plea agreement. U.S. v. Rubio, C.A.D.C.2012, 677 F.3d 1257.Constitutional Law⚷4587Criminal Law⚷273.1(4)

Preferences | My Contacts | Offers | Getting Started | Help | Live Chat | Sign Off

WestlawNext. © 2013 Thomson Reuters | Privacy Statement | Accessibility | Contact Us | 1-800-REF-ATTY (1-800-733-2889) | **Improve WestlawNext**

THOMSON REUTERS

About | Contact | Send Comments, Tips | Donate

« Panjwai Rogue Night Raider: Probably Not a Malingerer | Eric Holder Suggests Scary Iran Plot Was Legal »

Ed Rendell Defends Material Support of the "Right" Terrorists

Posted on March 12, 2012 by emptywheel

When I first read that Treasury is investigating Ed Rendell for his paid speeches supporting the MEK, I was gratified that the government might finally be showing some balance in its pursuit of terrorists.

> Mr. Rendell, who asserts that he has done nothing illegal, said the Treasury Department's Office of Foreign Assets Control issued a Feb. 29 subpoena seeking "transactional records about what payments we received for speaking fees."
>
> The subpoena was sent to the office of Thomas McGuire, an attorney for the Los Angeles-based talent agency William Morris Endeavor Entertainment, which handles all of Mr. Rendell's speaking engagements, including those in which he has advocated on behalf of the MEK.

But this is the Moonie Times and Rendell alerted the press himself. So in truth, this is just an opportunity for him and Tom Ridge (who, as another paid MEK supporter, presumably would also be under investigation) to support MEK by saying that even though it is a designated terrorist organization, it doesn't matter if people flout the law and provide it support.

> "I've been in politics 34 years, and I can tell you right now that I would not jeopardize my reputation for any amount of money," said Mr. Rendell. "I did my research extensively on this issue before I ever agreed to speak on it, and I am 100 percent convinced that the MEK shouldn't be on the foreign terrorist organization list."
>
> As to the extent to which accepting payments for such advocacy may or may not be legal, Mr. Ridge said it is a "moot question."
> "Assuming there may be a question, and we don't think there is, the bigger question is: Does the MEK belong on the list?" he said. "It's kind of curious that those who don't like our advocacy are suggesting that we might be doing something wrong."

Ed Rendell is a lawyer. Yet when he did his research, he did not check whether doing paid speeches for MEK would be lawful. No, he says, he did research and is convinced that MEK shouldn't be on the list. Tom Ridge, also a lawyer–not to mention a former top counterterrorism official who can't claim to be ignorant of the law–says it'd be "moot" if it were illegal to give paid speeches in support of MEK, because the group shouldn't be on the terrorist list.

But it is.

What's funniest about this article–and the reason why this article would probably only appear in the Moonie Times–is that it makes no peep of recent allegations (confirmed by two US officials in the article) that MEK has been partnering with Israel to assassinate Iranian scientists.

> Deadly attacks on Iranian nuclear scientists are being carried out by an Iranian dissident group that is financed, trained and armed by Israel's secret service, U.S. officials tell NBC News, confirming charges leveled by Iran's leaders.

Search [Search] (Search)

1 Tip for a tiny belly:

Cut down a bit of your belly everyday by following this 1 weird old tip.
Tip

The Emptywheel Twitterverse

Latest...

JimWhiteGNV Shot By Government Forces or Victim of His Own Bomb: How Did Bahrain Teen Die? http://t.co/9M0ZM3MsDr
19m • reply • retweet • favorite

emptywheel @jilliancyork She prolly doesn't know you're part of a FSB plot.
1h • reply • retweet • favorite

emptywheel @jjkaraganis the NSA is glad to hear that.
1h • reply • retweet • favorite

emptywheel RT @_cypherpunks_: Letter to NSA from @privacyint asking how to enact redress provisions guaranteed under #SWIFT arrangement. https://t.co/...
1h • reply • retweet • favorite

emptywheel @lawscribe @gracels They're withholding stuff (that pertains to spooked up uncle, and Tamerlan's alleged role in Waltham) unless mitigation

Latest Posts

Shot By Government Forces or Victim of His Own Bomb: How Did Bahrain Teen Die?

Carmen Ortiz Blows Off Dzhokhar Tsarneav's Request on His Own Involvement in Waltham

The Common Commercial Services OLC Memo and

> The group, the People's Mujahedin of Iran, has long been designated as a terrorist group by the United States, accused of killing American servicemen and contractors in the 1970s and supporting the takeover of the U.S. Embassy in Tehran before breaking with the Iranian mullahs in 1980.

Mind you, this may well be where this argument is going. The US pretends it has had nothing to do with the serial assassinations of these scientists–in spite of hints to the contrary or an apparent CIA exception allowing assassination in non-terrorism contexts. While that puts the legal pressure on the US to delist the MEK in different light, it also means that the US will probably once again apply its own terrorist laws selectively, allowing our larger support for this particular terrorist to–as Ridge predicts–moot the law prohibiting material support–even if it involves just speech–for terrorism.

Update: Glenn Greenwald catalogs Fran Fragos Townsend's hypocrisy on this issue in all its glory:

> How reprehensible is the conduct of Fran Townsend here? Just two years ago, she went on CNN to celebrate a Supreme Court decision that rejected First Amendment claims of free speech and free association in order to rule that anyone — most often Muslims — can be prosecuted under the "material support" statute simply for advocacy for a Terrorist group that is coordinated with the group. And yet, the minute Fran Townsend gets caught doing exactly that — not just out of conviction but also because she's being paid by that Terrorist group — she suddenly invokes the very same Constitutional rights whose ersosions she cheered when it came to the prosecution of others.

0 share share Like 2

This entry was posted in Terrorism and tagged Ed Rendell, Holder v. HLP, MEK, Tom Ridge by emptywheel. Bookmark the permalink.

Zombie CISPA
Intelligence Committees: Not Informed about Torture, Not Informed about Drone Casualties, Not Informed about US Person Spying
False Prophet of Adequate Congressional Oversight Finds Congressional Ignorance Unnewsworthy
The USAID vs SIGAR Pissing Contest
Obama Throws Top Spying Partner, Verizon, at ObamaCare
Did Chuck Hagel Cut Off Poor Bandar?
Why Does France Get Publicly-Reported Phone Calls?
On the 12th Day of Christmas, the NSA Gave to Me ... 12 "Terrorism Supporters"

6 thoughts on "Ed Rendell Defends Material Support of the "Right" Terrorists"

1. Starbuck on March 12, 2012 at 1:12 pm said:

   What Greenwald points to is situational ethics. Speed Laws are valid…until you get the ticket.

   (Fill in for speed laws!)

2. Juergista on March 12, 2012 at 1:42 pm said:

   The US court says the following:

   2012 Ruling
   On February 27, 2012, the legal counsel for Iran's principal opposition movement, the Mujahedin-e Khalq (PMOI/MEK), filed a Writ of Mandamus in the United States Court of Appeals for the District of Columbia Circuit to enforce the Court's July 2010 ruling which ordered the Secretary of State to reconsider the PMOI's petition to be removed from the list of Foreign Terrorist Organizations (FTO). The PMOI "seeks a writ of mandamus, in the face of unwarranted and unreasonable agency delay, to order the Secretary of State to delist PMOI as a designated 'Foreign Terrorist Organization,' or, alternatively, to act on PMOI's request for

ggreenwald@salon.com

MONDAY, MAR 12, 2012 12:25 PM UTC

Washington's high-powered terrorist supporters

As investigations begin into paid D.C. advocates of a dissident Iranian group, their self-defenses are revealing

BY GLENN GREENWALD

more

TOPICS: POLITICS NEWS

Glenn Greenwald (email: **GGreenwald@salon.com**) is a former Constitutional and civil rights litigator and is the author of three *New York Times* Bestselling books: two on the Bush administration's executive power and foreign policy abuses, and his latest book, **With Liberty and Justice for Some**, an indictment of America's
two-tiered system of justice. Greenwald was named by *The Atlantic* as one of the 25 most influential political commentators in the nation. He is the recipient of the first annual I.F. Stone Award for Independent Journalism, and is the winner of the 2010 Online Journalism Association Award for his investigative work on the arrest and oppressive detention of Bradley Manning.

CONTINUE READING

follow salon

Fran Townsend (Credit: Reuters/Larry Downing)

We now have an extraordinary situation that reveals the impunity with which political elites commit the most egregious crimes, as well as the special privileges to which they explicitly believe they — and they alone — are entitled. That a large bipartisan cast of Washington officials got caught being paid substantial sums of money by an Iranian dissident group that is legally designated by the U.S. Government as a Terrorist organization, and then meeting with and advocating on behalf of that Terrorist group, is very significant for several reasons. New developments over the last week make it all the more telling. Just behold the truly amazing set of facts that have arisen:

In June, 2010, the U.S. Supreme Court issued its 6-3 ruling in the case of *Holder v. Humanitarian Law*. In that case, the Court upheld the Obama DOJ's very broad interpretation of the statute that criminalizes the providing of "material support" to groups formally designated by the State Department as Terrorist organizations. The five-judge conservative bloc (along with Justice Stevens) held that pure political speech could be permissibly criminalized as "material support for Terrorism" consistent with the First Amendment if the "advocacy [is] **performed in coordination with**, or at the direction of, a foreign terrorist organization" (emphasis added). In other words, pure political advocacy in support of a designated Terrorist group could be prosecuted as a felony — punishable with 15 years in prison — if the advocacy is coordinated with that group.

This ruling was one of the most severe erosions of free speech rights in decades because, as Justice Breyer (joined by Ginsberg and Sotomayor) pointed out in dissent, "all the activities" at issue, which the DOJ's interpretation would criminalize, "involve the communication and advocacy of political ideas and lawful means of achieving political ends." The dissent added that the DOJ's broad interpretation of the statute "gravely and without adequate justification injure[s] interests of the kind the First Amendment protects." As Georgetown Law Professor David Cole, who represented the plaintiffs, explained, this was literally "**the first time ever**" that "the Supreme Court has ruled that the First Amendment permits the criminalization of pure speech advocating lawful, nonviolent activity." Thus, "the court rule[d] that speech advocating only lawful, nonviolent activity can be made a crime, and that any coordination with a blacklisted group can land a citizen in prison for 15 years." Then-Solicitor-General Elena Kagan argued the winning Obama DOJ position before the Court.

Whatever one's views are on this ruling, it is now binding law. To advocate on behalf of a designated Terrorist group constitutes the felony of "providing material support" if that advocacy is coordinated with the group.

Like most assaults on the Constitution in the name of Terrorism during the Obama presidency, criticism of that Court decision was rare in establishment circles (that's because Republicans consistently support such assaults while Democrats are reluctant to criticize them under Obama). On the day the *Humanitarian Law* decision was released,

BROUGHT TO YOU BY

MOST READ

Stop enabling the right: The media just makes dysfunction worse
PAUL ROSENBERG

Inside the Fox News lie machine: I fact-checked Sean Hannity on Obamacare
ERIC STERN

Just secede already: The obstructionists aren't going anywhere. Maybe we should
CHUCK THOMPSON

My son is not the poster child for the Right to Life movement
EMILY RAPP

Conspiracy theories explain the right
ARTHUR GOLDWAG

TED talks are lying to you
THOMAS FRANK

How I met your father
ERIKA KLEINMAN

7 horrifying truths about your chicken dinner
MARTHA ROSENBERG, ALTERNET

Sam Harris slurs Malala: Famed atheist wrongly co-opts teenager's views
MURTAZA HUSSAIN

Right-wing pastor: Girl Scouts are wicked and their cookies promote lesbianism
KATIE MCDONOUGH

The secret conservative message of the "Duck Dynasty" beards
JARRET RUMINSKI

A modest proposal to neutralize gerrymandering
DAVID BRIN

Vine gets steamy
TRACY CLARK-FLORY

CNN's Wolf Blitzer interviewed Fran Townsend, George Bush's Homeland Security Advisor and now-CNN analyst, and Townsend hailed the decision as "**a tremendous win for not only the United States but for the current administration**." Here's how that discussion went:

> **BLITZER**: There is a related case involved that the Supreme Court came out with today and I want to talk to you about this. The Supreme Court ruling today in the fight against terrorism . . . .The 6-3 decision by the Supreme Court, the justices rejecting the arguments that the law threatens the constitutional right of free speech. You read the decision, 6-3, only three of the Democratic appointed justices decided they didn't like this. They were the minority. But the majority was pretty firm in saying that **if you go ahead and express what is called material support for a known terrorist group, you could go to jail for that.**
>
> **TOWNSEND**: This is a tremendous win for not only the United States but for the current administration. It's interesting, Wolf, Elena Kagan the current Supreme Court nominee argued in favor of upholding this law. **This is an important tool the government uses to convict those**, to charge and convict, potentially convict those who provide money, recruits, **propaganda**, to terrorist organizations, but are not what we call people who actually blow things up or pull the trigger.
>
> **BLITZER**: So it's a major decision, a 6-3 decision by the Supreme Court. **If you're thinking about even voicing support for a terrorist group, don't do it because the government can come down hard on you** and the Supreme Court said the government has every right to do so.
>
> **TOWNSEND**: It is more than just voicing support, Wolf. It is actually the notion of providing material support, significant material support.
>
> **BLITZER**: But they're saying that if material support, they're defining as **expressing support or giving advice or whatever to that organization**.
>
> **TOWNSEND**: **That's right**. But it could be technical advice, bomb-building advice, fundraising.

So Fran Townsend lavishly praised this decision — one that, as Blitzer put it, means that "If you're thinking about even voicing support for a terrorist group, don't do it because the government can come down hard on you." And while Townsend was right that the decision requires "more than just voicing support" for the Terrorist group, the Court was crystal clear that such voicing of support, standing alone, can be prosecuted if it is done in coordination with the group ("the term 'service' [] cover[s] **advocacy performed in coordination with, or at the direction of, a foreign terrorist organization**").

But look at what is happening now to Fran Townsend and many of her fellow political elites. In August of last year, *The Christian Science Monitor*'s Scott Peterson published a detailed exposé about "a high-powered array of former top American officials" who have received "tens of thousands of dollars" from a designated Terrorist organization – the Iranian dissident group Mojahedin-e Khalq (MEK) — and then met with its leaders, attended its meetings, and/or publicly advocated on its behalf. That group includes Rudy Giuliani, Howard Dean, Michael Mukasey, Ed Rendell, Andy Card, Lee Hamilton, Tom Ridge, Bill Richardson, Wesley Clark, Michael Hayden, John Bolton, Louis Freeh — **and Fran Townsend.** This is how it works:

> Former US officials taking part in MEK-linked events told the Monitor or confirmed publicly that they received substantial fees, paid by local Iranian-American groups to speaker bureaus that handle their public appearances.
>
> The State Dept. official, who is familiar with the speech contracts, explains the

Don't ally with libertarians: Ideologues co-opt an anti-NSA rally
TOM WATSON

Cop fired after attempting to arrest woman who rebuffed his advances
NATASHA LENNARD

POPULAR ON REDDIT

Study: Religious more likely to lie for financial gain
2250 points | 508 comments

The Tea Party is an anti-populist elite tool. And it has progressives fooled. This is not some spontaneous uprising. It's the newest incarnation of a rich, elite, right-wing tradition
188 points | 33 comments

The Tea Party is an anti-populist elite tool. And it has progressives fooled.
52 points | 46 comments

Anti-Defamation League slams Jewish groups for Israel criticism
13 points | 2 comments

How science nailed the age of the Earth
8 points | comment

FROM AROUND THE WEB

> mechanism: "Your speech agent calls, and says you get $20,000 to speak for 20 minutes. They will send a private jet, you get $25,000 more when you are done, and they will send a team to brief you on what to say."

As but one example, Rendell, the former Democratic Governor of Pennsylvania and current MSNBC contributor, was paid $20,000 for a 10- minute speech before a MEK gathering, and has been a stalwart advocate of the group ever since.

Even for official Washington, where elite crimes are tolerated as a matter of course, this level of what appears to be overt criminality — taking large amounts of money from a designated Terrorist group, appearing before its meetings, meeting with its leaders, then advocating on its behalf — is too much to completely overlook. *The Washington Times* reported on Friday that the Treasury Department's counter-Terrorism division is investigating speaking fees paid to former Gov. Rendell, who, the article notes, has "become among [MEK's] most vocal advocates." According to Rendell, "investigators have subpoenaed records related to payments he has accepted for public speaking engagements" for MEK. As the article put it, "some observers have **raised questions about the legality of accepting payment in exchange for providing assistance or services to a listed terrorist group**." Beyond the "material support" crime, engaging in such transactions with designated Terrorist groups is independently prohibited by federal law:

> David Cole, a professor at the Georgetown University Law Center, noted that "any group that's on the list is also, by definition, on the Treasury Department's list for specially designated global terrorists."
>
> **"Anyone in the United States is prohibited from engaging in any transaction with such an entity**," he said.
>
> While Mr. Cole stressed his personal belief that individuals have a "First Amendment right to speak out freely" for an organization like the MEK, he said that "**it is a crime to engage in any transaction, which would certainly include getting paid to do public relations for them.**"

Presented by Scribol

ADVERTISEMENT

Rendell has a lot of company in the commission of what very well may be these serious crimes — including the very same Fran Townsend who cheered the *Humanitarian Law* decision that could be her undoing. After someone on Twitter wrote to her this weekend to say that she should be prosecuted (and "put in GITMO indefinitely") for her "material support"of MEK, this is how — with the waving American flag as her chosen background — she defended herself in reply:

How reprehensible is the conduct of Fran Townsend here? Just two years ago, she went on CNN to celebrate a Supreme Court decision that rejected First Amendment claims of free speech and free association in order to rule that anyone — most often Muslims — can be prosecuted under the "material support" statute simply for advocacy for a Terrorist group that is coordinated with the group. And yet, the minute Fran Townsend gets caught doing exactly that — not just out of conviction but also because she's being paid by that Terrorist group — she suddenly invokes the very same Constitutional rights whose erosions she cheered when it came to the prosecution of others. Now that her own liberty is at stake by virtue of getting caught being on the dole from a Terrorist group, she suddenly insists that the First Amendment allows her to engage in this behavior: exactly the argument that *Humanitarian Law* rejected, with her gushing approval on CNN ("**a tremendous win for not only the United States but for the current administration**"; **This is an important tool the government uses to convict those . . .** who provide [] **propaganda**, to terrorist organizations")."

What is particularly repellent about all of this is not the supreme hypocrisy and self-interested provincialism of Fran Townsend. That's all just par for the course. What's infuriating is that there are large numbers of people — almost always Muslims — who have been prosecuted and are now in prison for providing "material support" to Terrorist groups for doing **far less** than Fran Townsend and her fellow cast of bipartisan ex-officials have done with and on behalf of MEK. In fact, the U.S. Government has been (under the administration in which Townsend worked) and still is (under the administration Rendell supports) continuously prosecuting Muslims for providing "material support" for Terrorist groups based on their pure speech, all while Fran Townsend, Ed Rendell and company have said nothing or, worse, supported the legal interpretations that justified these prosecutions.

The last time I wrote about these individuals' material support for MEK, I highlighted just a few of those cases:

- A Staten Island satellite TV salesman in 2009 was sentenced to five years in federal prison merely for including a Hezbollah TV channel as part of the satellite package he sold to customers;
- a Massachusetts resident, Tarek Mehanna, is being prosecuted now "for posting pro-jihadist material on the internet";
- a 24-year-old Pakistani legal resident living in Virginia, Jubair Ahmad, was indicted last September for uploading a 5-minute video to YouTube that was highly critical of U.S. actions in the Muslim world, an allegedly criminal act simply because prosecutors claim he discussed

THE LISTENER: "The Signature of All Things": Adventures of a lady scientist

HUFFPOST POLITICS

Bill De Blasio, Joe Lhota Face Off In Heated Televised Debate

Big Newspapers Tilted In Favor Of The NSA, Study Finds

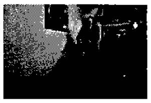
New Cheney Book

Obama Appeals To Allies To Help Stay The Course On Health Care Law

The Affordable Care Act Will Defeat Mitch McConnell's Reelection Bid

BuzzFeed Politics

Virginia Democrats Pull Oral Sex-Themed Posters After Questions Arise


How Democrats Are Trying To Annoy Their Way Into The Majority

Rep. Bill Young's Widow Bans Charlie Crist From His Memorial Service

This 1970s Smokey Bear Ad Will Haunt Your Dreams

This MSNBC "Kimye" Chyron Is Perfect

UPWORTHY

Ever Hear About The Lady Who Spilled Coffee On Herself At McDonald's, Then Sued For Millions?

If You Don't See The Fearlessness In These Photos,

the video in advance with the son of a leader of a designated Terrorist organization (Lashkar-e-Tayyiba);

- a Saudi Arabian graduate student, Sami Omar al-Hussayen, was prosecuted simply for maintaining a website with links "to groups that praised suicide bombings in Chechnya and in Israel" and "jihadist" sites that solicited donations for extremist groups (he was ultimately acquitted); and,
- last July, a 22-year-old former Penn State student and son of an instructor at the school, Emerson Winfield Begolly, was indicted for — in the FBI's words — "repeatedly using the Internet to **promote violent jihad** against Americans" by posting comments on a "jihadist" Internet forum including "a comment online that **praised** the shootings" at a Marine Corps base, action which former Obama lawyer Marty Lederman said "does not at first glance appear to be different from the sort of advocacy of unlawful conduct that is entitled to substantial First Amendment protection."

What Do You See?

A Woman Who Never Thought She'd Have An Abortion Is Getting What She Deserves

I Watched Mr. Rogers, Too, But I Don't Think This Is What He Meant By 'Neighborly'

They Said He Was 'Evil' And 'Bad,' But He's Actually Really, Really Astonishingly Good

Yet we have the most well-connected national security and military officials in Washington doing far more than all of that right out in the open — they're receiving large payments from a Terrorist group, meeting with its leaders, attending their meetings, and then advocating for them in very public forums; Howard Dean, after getting paid by the group, actually called for MEK's leader to be recognized as the legitimate President of Iran – and so far none have been prosecuted or even indicted. The Treasury Department investigation must at least scare them. Thus, like most authoritarians, Fran Townsend suddenly discovers the importance of the very political liberties she's helped assault now that those Constitutional protections are necessary to protect herself from prosecution. It reminds me quite a bit of how former Democratic Rep. Jane Harman — one of the most reliable advocates for Bush's illegal spying program — suddenly started sounding like a life-long, outraged ACLU member as soon as it was revealed that her own private communications were **legally** surveilled by the U.S. Government.

One can reasonably debate whether MEK actually belongs on the list of Terrorist organizations (the same is true for several other groups on that list). But as a criminal matter, that debate is irrelevant. The law criminalizes the providing of material support to any group on that list, and it is not a defense to argue after one gets caught that the group should be removed.

Moreover, the argument that MEK does not belong on the Terrorist list — always a dubious claim — has suffered a serious blow in the last couple of months. An *NBC News* report from Richard Engel and Robert Windrem in February claimed that it was MEK which perpetrated the string of assassinations of Iranian nuclear scientists, and that the Terrorist group "is financed, trained and armed by Israel's secret service" (MEK denied the report). If true, it means that MEK continues to perpetrate definitive acts of Terrorism: using bombs and guns to kill civilian scientists and severely injure their wives. Yet Townsend, Rendell, Dean, Giuliani and other well-paid friends continue to be outspoken advocates of the group. Even the dissenters in *Humanitarian Law* argued that the First Amendment would allow "material support" prosecution "when the defendant **knows or intends that those activities will assist the organization's unlawful terrorist actions**." A reasonable argument could certainly be advanced that, in light of these recent reports about MEK's Terrorism, one who takes money from the group and then advocates for its removal from the Terrorist list "knows or intends that those activities will assist the organization's unlawful terrorist actions": a prosecutable offense even under the dissent's far more limited view of the statute.

But whatever else is true, the activities of Townsend, Rendell, Dean, Giuliani and the rest of MEK's paid shills are providing more than enough "material support" to be prosecuted under the *Humanitarian Law* decision and other statutes. They're providing more substantial "material support" to this Terrorist group than many people — usually vulnerable, powerless Muslims — who are currently imprisoned for that crime. It's nice that Fran Townsend suddenly discovered the virtues of free speech and free association guarantees, but under the laws she and so many others like her have helped implement and defend, there is a very strong case to make that her conduct and those of these other well-connected advocates for this Terrorist group is squarely within the realm of serious criminal behavior.

more

In wake of government shutdown, GOP senator faces trouble back home

Next Article

YOU MIGHT ALSO LIKE

MORE RELATED STORIES

FEATURED SLIDE SHOWS

RELATED VIDEOS

This site uses cookies. By continuing to browse the site you are agreein[g] to our use of cookies. Find out more here

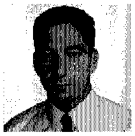
theguardian

GLENNGREENWALD
ON SECURITY AND LIBERTY

HSBC, too big to jail, is the new poster child for US two-tiered justice system

DOJ officials unblinkingly insist that the banking giant is too powerful and important to subject to the rule of law

Follow Glenn Greenwald On Security And Liberty by email BETA



Glenn Greenwald
theguardian.com, Wednesday 12 December 2012 05.14 EST

Assistant attorney general Lanny Breuer said taking away HSBC's US banking licence could have cost thousands of jobs. Photograph: Richard Drew/AP

(updated below)

The US is the world's largest prison state, imprisoning more of its citizens than any nation on earth, both in absolute numbers and proportionally. It imprisons people for longer periods of time, more mercilessly, and for more trivial transgressions than any nation in the west. This sprawling penal state has been constructed over decades, by both political parties, and it punishes the poor and racial minorities at overwhelmingly disproportionate rates.

But not everyone is subjected to that system of penal harshness. It all changes radically when the nation's most powerful actors are caught breaking the law. With few exceptions, they are gifted not merely with leniency, but full-scale immunity from criminal punishment. Thus have the most egregious crimes of the last decade been fully shielded from prosecution when committed by those with the greatest political and economic power: the construction of a worldwide torture regime, spying on Americans' communications without the warrants required by criminal law by government agencies and the telecom industry, an aggressive war launched on false pretenses, and massive, systemic financial fraud in the banking and credit industry that triggered the 2008 financial crisis.

This two-tiered justice system was the subject of my last book, "With Liberty and Justice for Some", and what was most striking to me as I traced the recent history of this phenomenon is how explicit it has become. Obviously, those with money and power always enjoyed substantial advantages in the US justice system, but lip service was at least always paid to the core precept of the rule of law: that - regardless of power, position and prestige - all stand equal before the blindness of Lady Justice.

It really is the case that this principle is now not only routinely violated, as was always true, but explicitly repudiated, right out in the open. It is commonplace to hear US elites unblinkingly insisting that those who become sufficiently important and influential are - and should be - immunized from the system of criminal punishment to which everyone else is subjected.

Worse, we are constantly told that immunizing those with the greatest power is not for their good, but for our good, for our collective good: because it's better for all of us if society is free of the disruptions that come from trying to punish the most powerful, if we're free of the deprivations that we would collectively experience if we lose their extraordinary value and contributions by prosecuting them.

This rationale was popularized in 1974 when Gerald Ford explained why Richard Nixon - who built his career as a "law-and-order" politician demanding harsh punishments and unforgiving prosecutions for ordinary criminals - would never see the inside of a courtroom after being caught committing multiple felonies; his pardon was for the good not of Nixon, but of all of us. That was the same reasoning hauled out to justify immunity for officials of the National Security State who tortured and telecom giants who illegally spied on Americans (*we need them to keep us safe and can't disrupt them with prosecutions*), as well as the refusal to prosecute any Wall Street criminals for their fraud (*prosecutions for these financial crimes would disrupt our collective economic recovery*).

A new episode unveiled on Tuesday is one of the most vivid examples yet of this mentality. Over the last year, federal investigators found that one of the world's largest banks, HSBC, spent years committing serious crimes, involving money laundering for terrorists; "facilitat[ing] money laundering by Mexican drug cartels"; and "mov[ing] tainted money for Saudi banks tied to terrorist groups". Those investigations uncovered substantial evidence "that **senior bank officials were complicit in the illegal activity**." As but one example, "an HSBC executive at one point argued that the bank should continue working with the Saudi Al Rajhi bank, which has supported Al Qaeda."

Needless to say, these are the kinds of crimes for which ordinary and powerless people are prosecuted and imprisoned with the greatest aggression possible. If you're Muslim and your conduct gets anywhere near helping a terrorist group, even by accident, you're going to prison for a long, long time. In fact, powerless, obscure, low-level employees are routinely sentenced to long prison terms for engaging in relatively petty money laundering schemes, unrelated to terrorism, and on a scale that is a tiny fraction of what HSBC and its senior officials are alleged to have done.

But not HSBC. On Tuesday, not only did the US Justice Department announce that HSBC would not be criminally prosecuted, but outright claimed that the reason is that they are too important, too instrumental to subject them to such disruptions. In other words, shielding them from the system of criminal sanction to which the rest of us are subject is not for their good, but for our common good. We should not be angry, but grateful, for the extraordinary gift bestowed on the global banking giant:

> "US authorities defended their decision not to prosecute HSBC for accepting the tainted money of rogue states and drug lords on Tuesday, insisting that a $1.9bn fine for a litany of offences was preferable to the 'collateral consequences' of taking the bank to court. . . .
>
> "Announcing the record fine at a press conference in New York, assistant attorney general Lanny Breuer said that despite HSBC"s 'blatant failure' to implement anti-money laundering controls and its wilful flouting of US sanctions, the consequences of a criminal prosecution would have been dire.
>
> "Had the US authorities decided to press criminal charges, HSBC would almost certainly have lost its banking licence in the US, the future of the institution would have been under threat and the entire banking system would have been destabilised.
>
> "HSBC, Britain's biggest bank, said it was 'profoundly sorry' for what it called 'past mistakes' that allowed terrorists and narcotics traffickers to move billions around the financial system and circumvent US banking laws. . . .
>
> "As part of the deal, HSBC has undertaken a five-year agreement with the US department of justice under which it will install an independent monitor to assess reformed internal controls. The bank's top executives will defer part of their bonuses for the whole of the five-year period, while bonuses have

> been clawed back from a number of former and current executives, including those in the US directly involved at the time.
>
> "John Coffee, a professor of law at Columbia Law School in New York, said the fine was consistent with how US regulators have been treating bank infractions in recent years. 'These days they rarely sue individuals in any meaningful way when the entity will settle. This is largely a function of resource constraints, but also risk aversion, and a willingness to take the course of least resistance,' he said."

DOJ officials touted the $1.9 billion fine HSBC would pay, the largest ever for such a case. As the Guardian's Nils Pratley noted, "the sum represents about four weeks' earnings given the bank's pre-tax profits of $21.9bn last year." Unsurprisingly, "the steady upward progress of HSBC's share price since the scandal exploded in July was unaffected on Tuesday morning."

The New York Times Editors this morning announced: "It is a dark day for the rule of law." There is, said the NYT editors, "no doubt that the wrongdoing at HSBC was serious and pervasive." But the bank is simply too big, too powerful, too important to prosecute.

That's not merely a dark day for the rule of law. It's a wholesale repudiation of it. The US government is expressly saying that banking giants reside outside of - above - the rule of law, that they will not be punished when they get caught red-handed committing criminal offenses for which ordinary people are imprisoned for decades. Aside from the grotesque injustice, the signal it sends is as clear as it is destructive: *you are free to commit whatever crimes you want without fear of prosecution.* And obviously, if the US government would not prosecute these banks on the ground that they're too big and important, it would - yet again, or rather still - never let them fail.

But this case is the opposite of an anomaly. That the most powerful actors should be immunized from the rule of law - not merely treated better, but fully immunized - is a constant, widely affirmed precept in US justice. It's applied to powerful political and private sector actors alike. Over the past four years, the CIA and NSA have received the same gift, as have top Executive Branch officials, as has the telecom industry, as has most of the banking industry. This is how I described it in "With Liberty and Justice for Some":

> "To hear our politicians and our press tell it, the conclusion is inescapable:

we're far better off when political and financial elites - and they alone - are shielded from criminal accountability.

> "It has become a virtual consensus among the elites that their members are so indispensable to the running of American society that vesting them with immunity from prosecution - even for the most egregious crimes - is not only in their interest but in our interest, too. Prosecutions, courtrooms, and prisons, it's hinted - and sometimes even explicitly stated - are for the rabble, like the street-side drug peddlers we occasionally glimpse from our car windows, not for the political and financial leaders who manage our nation and fuel our prosperity.
>
> "It is simply too disruptive, distracting, and unjust, we are told, to subject them to the burden of legal consequences."

That is precisely the rationale explicitly invoked by DOJ officials to justify their decision to protect HSBC from criminal accountability. These are the same officials who previously immunized Bush-era torturers and warrantless eavesdroppers, telecom giants, and Wall Street executives, even as they continue to persecute whistleblowers at record rates and prosecute ordinary citizens - particularly poor and minorities - with extreme harshness even for trivial offenses. The administration that now offers the excuse that HSBC is too big to prosecute is the same one that quite consciously refused to attempt to break up these banks in the aftermath of the "too-big-to-fail" crisis of 2008, as former TARP overseer Neil Barofsky, among others, has spent years arguing.

And, of course, these HSBC-protectors in the Obama DOJ are the same officials responsible for maintaining and expanding what NYT Editorial Page editor Andrew Rosenthal has accurately described as "essentially a separate justice system for Muslims," one in which "the principle of due process is twisted and selectively applied, if it is applied at all." What has been created is not so much a "two-tiered justice system" as a multi-tiered one, entirely dependent on the identity of the alleged offender rather than the crimes of which they are accused.

Having different "justice systems" for citizens based on their status, wealth, power and prestige is exactly what the US founders argued most strenuously had to be avoided (even as they themselves maintained exactly such a system). But here we have in undeniable clarity not merely proof of exactly how this system functions, but also the rotted and fundamentally corrupt precept on which it's based: that some actors are simply too important and too powerful to punish criminally. As the Nobel Prize-winning economist Joseph Stiglitz warned in 2010, exempting the largest banks from criminal prosecution has meant that lawlessness and "venality" is now "at a higher level" in the US even than that which prevailed in the pervasively corrupt and lawless privatizing era in Russia.

Having the US government act specially to protect the most powerful factions, particularly banks, was a major impetus that sent people into the streets protesting both as part of the early Tea Party movement as well as the Occupy movement. As well as it should: it is truly difficult to imagine corruption and lawlessness more extreme than having the government explicitly place the most powerful factions above the rule of law even as it continues to subject everyone else to disgracefully harsh "justice". If this HSBC gift makes more manifest this radical corruption, then it will at least have achieved some good.

UPDATE

By coincidence, on the very same day that the DOJ announced that HSBC would not be indicted for its multiple money-laundering felonies, the New York Times published a story featuring the harrowing story of an African-American single mother of three who was sentenced to life imprisonment at the age of 27 for a minor drug offense:

> "Stephanie George and Judge Roger Vinson had quite different opinions about the lockbox seized by the police from her home in Pensacola. She insisted she had no idea that a former boyfriend had hidden it in her attic. Judge Vinson considered the lockbox, containing a half-kilogram of cocaine, to be evidence of her guilt.
>
> "But the defendant and the judge fully agreed about the fairness of the sentence he imposed in federal court.
>
> "'Even though you have been involved in drugs and drug dealing,' Judge Vinson told Ms. George, 'your role has basically been as a girlfriend and bag holder and money holder but not actively involved in the drug dealing, so certainly in my judgment it does not warrant a life sentence.'
>
> "Yet the judge had no other option on that morning 15 years ago. As her

> stunned family watched, Ms. George, then 27, who had never been accused of violence, was led from the courtroom to serve a sentence of life without parole.
>
> "'I remember my mom crying out and asking the Lord why,' said Ms. George, now 42, in an interview at the Federal Correctional Institution in Tallahassee. 'Sometimes I still can't believe myself it could happen in America.'"

As the NYT notes - and read her whole story to get the full flavor of it - this is commonplace for the poor and for minorities in the US justice system. Contrast that deeply oppressive, merciless punishment system with the full-scale immunity bestowed on HSBC - along with virtually every powerful and rich lawbreaking faction in America over the last decade - and that is the living, breathing two-tiered US justice system. How this glaringly disparate, and explicitly status-based, treatment under the criminal law does not produce serious social unrest is mystifying.

More from the Guardian What's this?

A 16-year-old's view on Some Girls 21 Oct 2013

Steve McQueen: I'm here because my family went through slavery 18 Oct 2013

My 53-year-old mother has had a baby, and it's changed me 17 Oct 2013

Fructose: the poison index 21 Oct 2013

Questions about Englishness raise more problems than they can solve 21 Oct 2013

More from around the web What's this?

10 Most Union-Made Cars In America (TheStreet)

Is a massive rebalancing of the world's economic, political and social power underway? (Merrill Lynch: Wealth Management)

Bad Credit History? Here's How to Fix It. (Lexington Law)

22 Things You Should Never Do Again After 50 (AARP)

What Happens When You Give Girls Building Blocks, Not Barbies? (Ideas Lab)

© 2013 Guardian News and Media Limited or its affiliated companies. All rights reserved.

;

"Morey provides more insight and understanding in one book than we got in the last decade of 24-hour nonstop corporate news." – Alexa O'Brien, Journalist

The GREAT AMERICAN DISCONNECT
Seven Fundamental Threats To Our Democracy

AVAILABLE FOR DOWNLOAD OCTOBER 7
PAPERBACK NOVEMBER 7
www.AmericanDisconnect.com

- BECOME A MEMBER
- About us
- Advertise
- Contact Us
- Send Comments/Tips

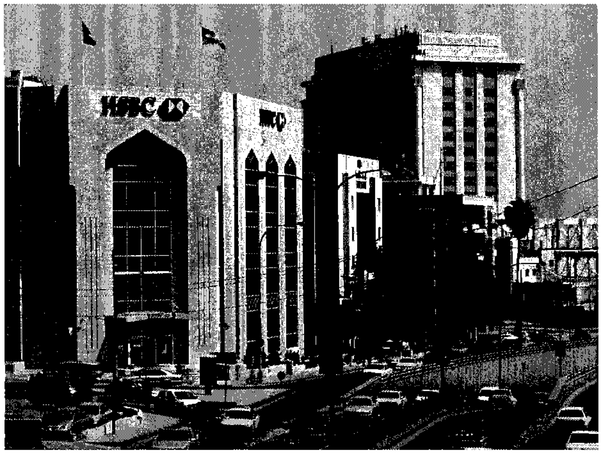
- Home
- My FDL
- Firedoglake
- News
- La Figa
- Book Salon
- FDL Action
- Elections
- Just Say Now
- Bytegeist
- Justice For All

« Gitmo Detainee's Body Returned to Yemen, New Details on His Death Revealed
Group Launches to Encourage Transparency & Aggressive Journalism, Help WikiLeaks Survive Blockade »

HSBC Bankers Get No Jail Time for Terrorist Financing While Somali Sentenced for Charity

By: Kevin Gosztola Sunday December 16, 2012 12:49 pm

6 points Like 365
Tweet 176



HSBC Branch in Amman, Jordan (Flickr Photo by Travel Aficionado)

This past week, the Justice Department announced that HSBC Bank had agreed to forfeit $1.256 billion and "enter a deferred prosecution agreement" for engaging in money laundering that involved the financing of drug cartels and groups with ties to terrorism. The agreement indicated there would be no criminal prosecution. Not one bank executive or lower-level banker would be put on trial and possibly sentenced to jail for his or her role in allowing money to be transferred to drug cartels or terrorists.

Meanwhile, that same day, Nima Ali Yusuf, 26, a Somali woman who fled war-torn Somalia when she was a child, was sentenced to eight years in prison for sending $1,450 to "members of a terrorist organization in her native country." The scale of the crime committed by Yusuf, who pled guilty to charges just over a year ago in December 2011, is incredibly minor and insignificant when compared to the acts engaged in by bank executives at HSBC.

Laid out in detail in a Senate report released in July of this year, HSBC was engaged in banking with the Al Rajhi Bank, which is run by members of the Al Rajhi family alleged to have been "major donors to al Qaeda or Islamic charities suspected of funding terrorism." They established "their own nonprofit organizations in the United States that sent funds to terrorist organizations, or used Al Rajhi Bank itself to facilitate financial transactions for individuals or nonprofit organizations associated with terrorism" in the years after the September 11th attacks, according to the report.

In March 2002, the US Treasury Department conducted a "search of 14 interlocking business and nonprofit entities in Virginia associated with the SAAR Foundation, an Al Rajhi-related entity and the Al Rajhi family.

As outlined in the Senate report:

> The SAAR Foundation is a Saudi-based nonprofit organization, founded by Sulaiman bin Abdul Aziz Al Rajhi in the 1970s, named after him, and used by him to support a variety of nonprofit endeavors, academic efforts, and businesses around the world. In 1983, the SAAR Foundation formed a Virginia corporation, SAAR Foundation, Inc., and operated it in the United States as a tax-exempt nonprofit organization under Section 501(c)(3) of the U.S. tax code. **In 1996, another nonprofit organization was incorporated in Virginia called Safa Trust Inc. These and other nonprofit and business ventures associated with the Al Rajhi family shared personnel and office space, primarily in Herndon, Virginia**. In 2000, SAAR Foundation Inc. was dissolved but the Safa Trust continued to operate.
>
> An affidavit filed by the United States in support of the search warrant alleged that the Safa Group appeared to be involved with providing material support to terrorism. Among other matters, it alleged that members of the Safa Group had **transferred "large amounts of funds ...directly to terrorist-front**

> **organizations since the early 1990's," including a front group for the Palestinian Islamic Jihad-Shikaki Faction, a designated terrorist organization. but the Safa Trust continued to operate. It also detailed a $325,000 donation by the Safa Trust to a front group for Hamas, another designated terrorist organization. In addition, the affidavit expressed suspicion about a transfer of over $26 million from members of the Safa Group to two offshore entities in the Isle of Man**. The affidavit further alleged that "one source of funds flowing through the Safa Group [was] from the wealthy Al-Rajhi family in Saudi Arabia."
>
> The search produced about 200 boxes of information which was then analyzed and used in other investigations and prosecutions, although neither the SAAR Foundation or Safa Trust has been charged with any wrongdoing. In 2003, Abdurahman Alamoudi, who had worked for SAAR Foundation Inc. from 1985 to 1990, as executive assistant to its president, pled guilty to plotting with Libya to assassinate the Saudi crown prince and was sentenced to 23 years in jail. He had also openly supported Hamas and Hezbollah, two terrorist organizations designated by the United States. **According to an affidavit supporting the criminal complaint against him, Mr. Alamoudi admitted receiving $340,000 in sequentially numbered $100 bills from Libya while in London, and planned "to deposit the money in banks located in Saudi Arabia, from where he would feed it back in smaller sums into accounts in the United States." According to the affidavit, he also admitted involvement in similar cash transactions involving sums in the range of $10,000 to $20,000**.

Additionally, a key founder of the Al Rajhi Bank was one of twenty key terror financiers Osama bin Laden dubbed the "Golden Chain."

The small sum of money Yusuf is alleged to have provided pales in comparison to the transactions highlighted above, which HSBC is believed to have enabled in part through its business with the Al Rajhi Bank.

Yusuf wrote a letter to the judge seeking to explain her contributions saying they were "motivated by a desire to provide food and medical care for those in need." Her attorneys backed her up on this saying she had wanted to help "friends with living expenses and debt relief" and never intended to provide "direct support" to any members of al-Shabaab.

According to her lawyers, Yusuf "discouraged the young men from engaging in martyrdom operations, such as suicide attacks but was otherwise supportive of their willingness to give up everything to fight against the Ethiopian troops and the transitional federal government of which she herself had been a victim." (Her lawyers suggest she was sympathetic to al Shabaab, even if she opposed certain tactics of fighting.)

In December 2010, Yusuf was one of four Somalis being prosecuted for giving money to people in Somalia. Local Somalis skeptical of the prosecutions, like Bashir Hassan, expressed the feeling that the government was criminalizing Muslims.

Hassan urged federal prosecutors to understand that "most Somalis here regularly send money to their homeland." He added, "People are starving. People don't have food to eat. So if you have some extra bucks, you better send them so they can survive. So sending money is something routine to our community."

An attorney defending an imam charged with supporting al Shabaab in Somalia declared, "I think Islamic giving, because that's part of the religion, has given difficulties to the government because they don't know how to deal with this...How can we stop Muslims from giving money? Because we really can't attack their religion directly because that would blow up in our face.' And I think these are politically motivated cases because really the government I don't think wants Muslims to give."

There does not appear to have been any intent to support the terrorism of al Shabaab proven in Yusuf's case, but all the prosecutors had to prove was there was a transaction where money likely wound up in the hands of Shabaab fighters and that was enough for a conviction. In contrast, in the case of HSBC one wonders what the bank would have had to do to be prosecuted criminally for their actions and have executives go to jail. The Justice Department found they had violated the Trading with the Enemy Act—the act a bank would be convicted of violating if they were financing or providing material support to terrorism. Whether they intended to violate these acts or not, they did commit violations so at least some from HSBC should be facing the prospect of being sentenced to jail.

What if any of the HSBC bank executives involved in allowing or looking the other way had been Muslims?

In a 2009 report by the American Civil Liberties Union, the discriminatory enforcement against Muslim charities was highlighted the US government crackdown on Muslim charities for giving money to troubled areas where terrorism activities were believed to be occurring:

> Within the space of ten days in December 2001, the federal government froze the assets of the three largest Muslim charities in the United States—the Holy Land Foundation for Relief and Development, Global Relief Foundation, and Benevolence International Foundation—effectively shutting each of them down. The government seized these charities' assets during the Muslim holy month of Ramadan, at the height of annual Muslim charitable giving. These charities, which had been operating without incident for years—and for over a decade in the case of the Holy Land Foundation—were not on any government watch list before their assets were frozen. Indeed, before it was shut down the Holy Land Foundation had made repeated requests to government officials for assistance in complying with the law, only to be rebuffed.

The ACLU characterized this crackdown as the "start of a pattern of conduct that violated the fundamental rights of American Muslim charities." And it "has chilled American Muslims' charitable giving in accordance with their faith, seriously undermining American values of due process and commitment to First Amendment freedoms." (The Holy Land Foundation case is particularly egregious. Five individuals are in prison now and their cases can be read about here.)

Depending on one's ethnicity, religion, class or occupation, the system of justice (or injustice) in America is now that a major bank can settle for what in HSBC's case was, according to Matt Taibbi, about two months' worth of profits when they engage in terrorist financing or banking where money is being transferred to drug cartels.

Executives can expect pretty "swift justice" too. The Senate report that created headlines was put out in the summer and in less than six months the Justice Department had an agreement with a settlement worked out. Yusuf was charged in 2010, pled guilty about a year later and then was in confinement for another year before being sentenced for 8 years for giving a little over a thousand to some poor people she knew and wanted to help in Somalia, the country where she was born.

The overwhelming conclusion one can draw is there is no limit to the political will the Justice Department or Treasury Department has to crackdown on Muslims for charity. They will go to immeasurable lengths to conflate giving with financing of terrorism. Jewish and Christian organizations give to countries with ongoing conflicts in ways similar to Muslim organizations and do not face government prosecutions. On the other hand, the Justice Department and the Treasury Department have no political will to hold banks accountable for crimes of terrorist financing with groups that have ties to al Qaeda. They will bend over backwards to ensure there is an outcome where the bank appears to be brought to justice but is not broken in such a way that it cannot continue business as usual.

13 Comments

Tags: Justice Department, Terrorism, Muslims, Al Qaeda, Senate, Somalia, Holy Land Foundation, Treasury Department, Nima Ali Yusuf, Matt Taibbi, HSBC